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In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

IN THE MATTER OF

H. R. WEISSBERG CORPORATION, a corporation,
Debtor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgment and the majority opinion of the United States Court of Appeals for the Seventh Circuit entered in this cause on April 4 and 25, 1969.

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals are not yet reported. They appear in the appendix, pp. 32-48, *infra*. A petition for rehearing *en banc* was filed and denied on May 20, 1969. Also on May 20, 1969, Judges Fairchild and Cummings issued an additional *per curiam* opinion with Judge Swygert again dis-

senting. The supplemental opinion and dissent are unreported to date and appear in the appendix, pp. 49-51, *infra*.

The trial court rendered an oral opinion on December 17, 1968, which was followed by a written order and memorandum confirming the sale on January 15, 1969. These are also unreported and appear in the appendix, pp. 1-6, 7-31, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on April 4, 1969; the opinion of the Court of Appeals was filed on April 25, 1969; a petition for rehearing *en banc* was denied on May 20, 1969, at which time a supplemental opinion was also filed.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. When supervising a sale required to be by sealed bid, is it an abuse of discretion for the district court to allow one of several bidders to revise his bid after the announced close of bidding and the publication of all the sealed bids submitted, while not allowing the other bidders to amend their bids?

> *There is a direct conflict between the Tenth Circuit and the Seventh Circuit with respect to whether or not a bidder at a judicial sale may amend a sealed bid after submission and publication but before confirmation. This Court should grant certiorari and resolve that conflict.*

2. When supervising a sale required to be by sealed bids, is it an abuse of discretion for the district court to sanction private negotiations after the close of bidding

and publication of all the sealed bids, between the trustee and one of the bidders, but not with any of the others, which negotiations resulted in material adjustments in that bidder's sealed bid?

The bidding procedures followed by the district court were so haphazard, fraught with irregularities and aggravated unfairness as to amount to a gross abuse of discretion that requires an exercise of this Court's power of supervision.

3. When evaluating several bids and approving and confirming one of those bids in a judicial sale, is it an abuse of discretion for the district court to rely upon subjective esthetic considerations which relate to that bidder's announced intent as to how he plans (but is not bound) to develop the property if it is awarded to him?

This issue is an important question of federal bankruptcy law which has not been, but should be, decided by this Court.

STATUTES INVOLVED

Section 116 of Chapter X of the Bankruptcy Act provides in pertinent part (11 U.S.C. §516 (3)):

> "§ 116. . . . Upon the approval of a petition, the judge may, in addition to the jurisdiction, powers, and duties in this chapter conferred and imposed upon him and the court—
>
> * * *
>
> (3) authorize a receiver or a trustee or a debtor in possession, upon such notice as the judge may prescribe and upon cause shown, to lease or sell any property of the debtor, whether real or personal, upon such terms and conditions as the judge may approve; . . ."

STATEMENT OF THE CASE

The trustee of the Estate of H. R. Weissberg Corporation, in a proceeding under Chapter X of the Bankruptcy Act, was authorized to offer the Edgewater Beach Hotel (hereinafter "Hotel") for sale, either free and clear of all claims thereto, or in the alternative subject to all encumbrances. [Item 9, pp. 1-2].[1]

The trustee initially offered the property for sale on return of oral bids in open court on October 9, 1968. See, (Tr. of October 9, 1968). The district court rejected all bids received on that date as being insufficient in amount and authorized the trustee to sell the Hotel at private sale without notice, but subject to the approval of the court. (Item 11).

Thereafter the trustee resumed negotiations with various bidders and with the consent of the court advised all interested parties that they should submit sealed bids to be opened on November 22, 1968, in the presence of the court. (Item 23, App. p. 9). Thereafter, at a hearing held on November 22, 1968 at 2:00 p.m., four sealed bids were received, opened and read aloud in open court. (Tr. of November 22, 1968, pp. 8-29).

Counsel for the trustee then requested a three-hour recess for the express purpose of enabling the bidders to amend, i.e., increase, their bids, again under seal. (Tr. of November 22, 1968, p. 44). Bidders were advised that the revised bids submitted on November 22, 1968 would be final. (Tr. of November 22, 1968, pp. 48, 50).

[1] These appeals were heard on an accelerated briefing schedule and no appendix was printed. The record on appeal consisted of twenty eight numbered items and transcripts of four proceedings. The designation "Item" refers to the item in the record on appeal in the Seventh Circuit Court of Appeals and the abbreviation "Tr." refers to the transcript.

Three hours later the hearing was resumed and all four of the bidders, including your petitioners, returned increased bids under seal. (See, Items 14, 16). In response to a question from the attorney representing the Securities and Exchange Commission as to the finality of the bidding, the trustee announced that "this is the final bidding hour as far as the trustee is concerned, unless the court shall direct otherwise." (Tr. of November 22, 1968, p. 50).

Of particular importance is the bid submitted by Marshall Holleb, as Nominee, (hereinafter "Holleb"), the ultimately successful bidder. Holleb offered to pay $800,000 for the trustee's equity in the Hotel

> "plus the assignment of insurance proceeds . . . or, at the option of the Trustee, an amount equal to the value of such fire loss as agreed upon between the trustee and the buyer."[2] (Item 23, Exhibit A, pp. 1-3).

Before adjournment, the attorney for the Securities and Exchange Commission inquired whether it would be acceptable if any of the bidders increased their cash offer during the time the bids were under consideration. (Tr. of November 22, 1968, p. 66). The Trustee said that it would not be acceptable. (Tr. of November 22, 1968, p. 66). The judge then said, "I think the position I understand the trustee to have taken is that as far as the trustee is concerned he is finished with asking for bids." (Tr. of November 22, 1968, p. 67). The court took the bids

[2] Included among the assets for sale was a claim owned by the debtor's estate on account of damage and loss from a prior fire at the Hotel. Bidders were informed in open court that the Trustee had been offered $72,000 by the insurance carrier to settle the claim. (Tr. of December 17, 1968, p. 51).

under advisement pending further analysis by the court, the trustee and the Securities and Exchange Commission. (Tr. of November 22, 1968, p. 67).

However, contrary to the bidding limitation imposed by the trustee, counsel for the trustee and Holleb entered into negotiations that resulted in material adjustments in the Holleb bid. The trustee did not conduct negotiations with petitioners.

On November 27, five days after the close of bidding, Holleb wrote the trustee indicating his agreement to purchase the fire loss claim for $200,000, thereby purporting to raise his bid to $1,000,000, in cash. (Item 23, Exhibit B). This letter changed the Holleb bid from $800,000 plus some subjective value for the fire loss to a firm cash offer of $1,000,000.

Additional changes in the Holleb bid, including an agreement to indemnify the estate for secured claims against personal property were made in two separate letters to the trustee, both dated December 2, 1968 each containing the following language:

> "In connection with the undersigned's offer to you to purchase the above-captioned property pursuant to a letter dated November 2, 1968, *as amended* by a letter dated November 27, 1968, . . .". (emphasis added) (Item 23, Exhibits C, D).

Upon learning of Holleb's November 27 and December 2 letters to the trustee, Harold Shlensky (hereinafter "Shlensky"), another of the bidders, attempted to amend his bid by waiving any right to any insurance proceeds received by the estate, thereby purporting to increase the value of his bid. (Item 16, Shlensky letter dated December 6, 1968).

Contrary to the actions of the other bidders, your petitioners honored the trustee's direction that bids be closed as of November 22, 1968, and did not amend their bid in reliance upon the trustee's assertion that increases in cash offers received after November 22, 1968, would not be considered.

Contrary to the bidding limitation imposed on November 22, 1968, the trustee received the revised Holleb bid and the district court afforded Holleb's December 2 bid "nunc pro tunc" treatment. (Item 23, p. 8, App. pp. 16-17). He refused to treat the Shlensky amendment of December 6 on the same terms; and your petitioners were not afforded an opportunity to amend their bid. (Item 23, p. 8, App. pp. 16-18).

On December 17, 1968, the district court approved the sale of the Hotel to Holleb on the basis of his revised and amended bid. The district court, in oral remarks, indicated that approval of the Holleb bid was based upon a preference for the Holleb "plan" for eventual development of the property. (Tr. of December 17, 1968, pp. 55-64; App. pp. 1-6).

On December 17, 1968, the district court announced an oral opinion, (App. pp. 1-6), and directed counsel for the trustee to prepare a draft order confirming the revised Holleb bid. (App. p. 6). On January 15, 1969, the order confirming the sale of the Hotel to Holleb was entered. (Item 23). On appeal the Court of Appeals for the Seventh Circuit entered a 2 to 1 decision affirming. (App. pp. 32-48). Rehearing *en banc* was denied on May 20, 1969, one judge dissenting (App. p. 49).

No questions of fact are involved.

REASONS FOR GRANTING CERTIORARI

1. THE DECISION OF THE SEVENTH CIRCUIT IN THIS CASE IS IN CONFLICT WITH THE DECISION OF THE TENTH CIRCUIT IN SMITH v. SAVE-RITE, 178 F. 2d 507 (10th Cir. 1949).

The district court permitted Holleb, who was a low bidder at the trustee's sale on receipt of sealed bids, to submit a higher bid after the close of bidding. It was an abuse of discretion for the district court to permit an apparent low bidder to increase his bid while the bids were under consideration and after the amount of the other bids was made public. Holleb's increase in the dollar amount of his bid after the close of bidding received *nunc pro tunc* treatment and was allowed by the district court and the Court of Appeals as consistent with the concept of finality of bidding.

Clearly, this is an untenable position. In effect, the district court ruled that November 22, 1968, was the final bidding date for all bidders while at the same time permitting Holleb to subsequently amend his bid. The trial judge had no warrant for such unequal treatment of competing bidders and his ruling is in direct conflict with *Smith* v. *Save-Rite*, 178 F. 2d 507 (10th Cir. 1949).

THE COURT OF APPEALS DECISION

The majority opinion of the Court of Appeals erroneously upheld the ruling of the district court but avoided discussion of the important legal principle at issue. The holding of the Court of Appeals is set forth as follows:

> "We cannot agree that the fact that the bidders were not required, by advance prescription, to make offers of identical, or alternative sets of conditions, *nor the fact that the Holleb November 22 offer had an alternative subject to later negotiation, which was carried out, so undermine the integrity or dignity of the sale that it was an abuse of discretion* not to reopen it under more specific preconditions." (App. p. 39; emphasis added).

This holding avoids the basic issue of fundamental unfairness to serious bidders who submitted sealed bids in good faith only to see the property knocked down by a bid submitted after the close of bidding. The district court's preoccupation with dignity, a refrain picked up by the Court of Appeals, skirts the task of defining the conduct that constitutes a gross abuse of discretion.

The only rationale supplied by the Court of Appeals in support of their holding on this critical issue was that it is arguable, at least in form, that on November 27 Holleb was merely filling in his November 22 offer. (App. p. 35). It is clear that he filled in his offer—he filled it in to the tune of $200,000. The legal issue that the Court of Appeals avoided is whether it is within the judicial discretion of the district court to approve such a procedure.

Fundamental fairness requires that bids received after the close of bidding at a judicial sale cannot be considered. In *Smith* v. *Save-Rite*, 178 F. 2d 507 (10th Cir. 1949), the Tenth Circuit refused to permit a bidder to submit a higher bid after the announced close of sealed bidding. The Tenth Circuit condemned such a procedure stating:

> "A practice of permitting an unsuccessful bidder at a public auction, through sealed bids, *after the amount of the highest and best bid at the auction had been disclosed,* to submit a second bid when the mat-

ter comes on for confirmation of the sale, would tend to destroy the efficacy of auctions through sealed bids." (178 F. 2d 507, 510; emphasis added).

The facts of this case present a situation that the Tenth Circuit's ruling was designed to avoid. Here, Holleb waited to learn the extent of the other bids and then after the close of bidding revised his bid to the amount necessary to overreach the other bidders.

This Court should hear this case to resolve the direct conflict between the holding of the Court of Appeals herein and the holding in *Smith* v. *Save-Rite,* 178 F. 2d 507 (10th Cir. 1949).

2. THE COURT OF APPEALS SANCTIONED SUCH A DEPARTURE BY THE DISTRICT COURT FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL SALE PROCEDURE, AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The Holleb bid of November 22, 1968, purported to grant an option to the trustee to elect to negotiate the sale of the fire insurance claim to Holleb or to keep the same for the benefit of the estate. It is axiomatic that an option arises and can be exercised only *after* acceptance of the bid that gives rise to the option. If the bid was accepted as written, the trustee could then have elected to keep the fire claim or sell it to Holleb for a negotiated sum.

At oral argument in the Court of Appeals it was learned that after the close of bidding, but *before* approval of any bid, the attorney for the trustee negotiated with Holleb so as to secure the Holleb November 27, 1968, amendment of $200,000. In effect, the trustee was allowed to, and did,

select Holleb as the purchaser and Holleb was permitted to qualify as such by raising his bid so as to make it the highest offer *after* all other bids were final. The trustee's counsel was admittedly involved in negotiations with Holleb which had the effect of over-reaching the other participants.

The approval of such a procedure by the district court, further sanctioned by the Court of Appeals, creates a precedent that will undermine the public's faith in judicial sales and discourage prospective purchasers from participating therein. For this reason, this Court should exercise its power of supervision over the lower courts to review this departure from accepted and normal judicial procedure.

3. ONE OF THE ISSUES INVOLVED HEREIN IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT: WHETHER SUBJECJECTIVE ESTHETIC CRITERIA ARE PROPER FACTORS FOR CONSIDERATION BY A DISTRICT COURT IN CONFIRMING A JUDICIAL SALE PURSUANT TO § 116 (3) OF THE BANKRUPTCY ACT. (11 USC §516 (3)).

The issue this Court should consider is whether, and to what extent, public interest is a proper factor for consideration by the district court in confirming a judicial sale under the Bankruptcy Act.

The majority of the panel of the Seventh Circuit in the case at bar appraised this question as follows:

> "There are some circumstances under which a court may consider the fact that a particular bidder will make a use of the property which serves the community interest." (App. p. 39).

The majority of the panel which upheld the district court cited *In re Prairie Coal Co.*, 40 F. Supp. 894 (E.D. Ill. 1941) in support of the above quoted observation. *Prairie Coal*, however, involved a sale to a bidder who promised the court that he would keep the object of the sale operating as a viable business concern to provide employment in a depressed area. This public interest factor was exceptional and an appropriate case for departure from the general rule that public interest factors have no place in determining which of several bids is the highest and best. The only known departures from this rule have been in the unusual situation involving the public interest in continuing employment of a large number of persons in depressed areas. See *Prairie Coal, supra* and *In re Winthrop Mills*, 109 F. Supp. 322 (S.D. Me. 1952).

The dissenting opinion in the Court of Appeals characterized the use of esthetic criteria in these terms:

> ". . . [T]he judge's statements at face value . . . permitted . . . extraneous and improper consideration [s] to influence his decision. . . . Holleb's statement with regard to his plans to develop the property in no way bound him and of course could not be accomplished without approval of the city's building department and zoning board. . . . [T]he request [for information with respect to ultimate development plans] was a complete afterthought. . . . [T]he district judge's consideration of ultimate use . . . was [a]n additional irregularity . . . ". (App. p. 46).

In this case, the Holleb "use" taken into account by United States District Judge, James B. Parsons, was nothing more than an architect's will-o'-the-wisp first impression. In any event, municipal authorities and not the United States District Court are charged with the duty of controlling the development of real estate in the City of

Chicago. In *Prairie Coal* and *Winthrop Mills*, unlike the case at bar, only the United States District Court could act to protect the public interest in maintaining employment.

Adding consideration of esthetics to the criteria to be considered in making an award in a judicial sale creates a new precedent whch is so vague as to undermine the entire sale procedure. This Court should take this opportunity to speak on this important question on which it has not previously spoken.

CONCLUSION

The district court has allowed, and the Court of Appeals has sanctioned, the amendment of a sealed bid after submission, publication and after the close of bidding.

The district court also permitted, and the Court of Appeals sanctioned, private negotiations between a low bidder and a court-appointed trustee and his representatives subsequent to the submission of sealed bids, which negotiations resulted in that bidder's increasing his bid so as to make it the highest bid.

The district court in awarding the property, relied upon subjective esthetic criteria not binding upon or even controlled by the bidder to whom he awarded the property. This the Court of Appeals has also sanctioned.

The procedure pursued in the district court and approved by the Seventh Circuit, as pointed out in the dissent, resulted in a procedure which ". . . was so haphazard and fraught with irregularities and aggravated unfairness as to amount to a gross abuse of discretion." (See Judge Swygert's dissenting opinion, App. p. 47).

In order to resolve the above described conflict between the circuits, in order to speak upon what criteria are properly within the ambit of considerations for the federal courts in confirming awards of real property sold under the Bankruptcy Act, and in the exercise of its supervisory powers over the lower courts, this Court should grant certiorari.

Respectfully submitted,

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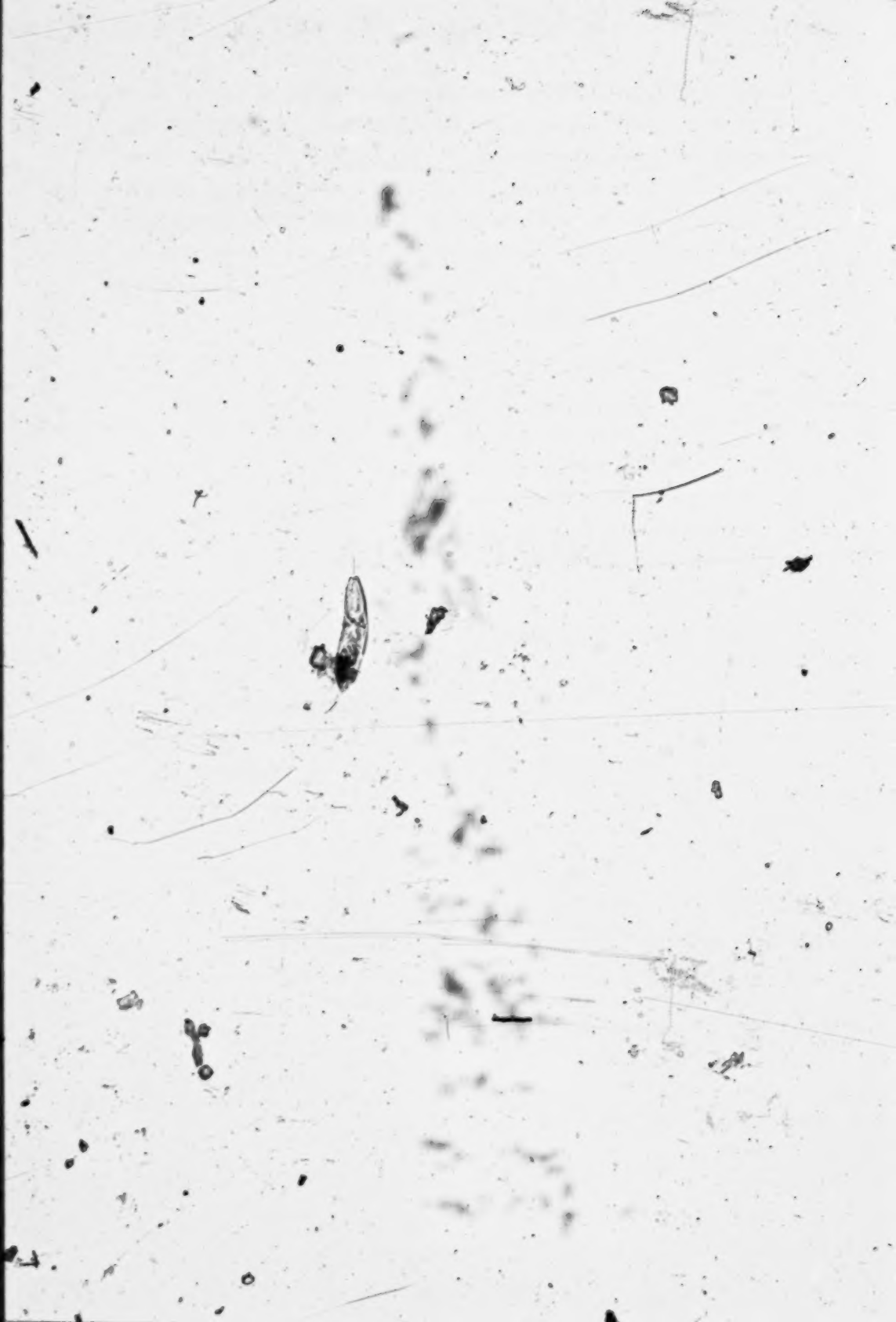

APPENDIX

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

In the Matter of:
H. R. WEISSBERG CORPORATION,
Debtor.
No. 67B9348

ORAL OPINION OF DECEMBER 17, 1968.

[Preceding colloquy omitted]

The Court: [The Honorable James B. Parsons] This matter has already given me a great deal of concern. It has given me concern before we entered the first order. You remember it was on September 19th that the Trustee filed his application asking leave to sell the assets of the Edgewater Beach property. He had already received a bid from Mr. Holleb as nominee.

He did not make a recommendation that that bid be accepted but he nevertheless felt obligated to file the application and make it known. Pursuant to the proper provisions of the bankruptcy Act, it was so made known and made public and an offer was extended to the public to come in and bid for this property.

You will recall that from the very outset I had not opened nor permitted to be opened the appraisal on the property that had been done by a very fine real estate appraisal firm when it was under Chapter XI. This matter came to me under Chapter X.

It was my determination at that moment that, should that appraisal become public, that the opportunity of the Court to sell the property at its best sale value would be ruined, and this is because I, with great respect for ap-

praisers, feel that unless they are much more attuned to the entire problems that are involved with the kind of property that we are dealing with, very likely would not appraise it at its real worth.

An example of that is that it is my belief that the appraiser set the cost of demolition of the existing structures at half the cost of the demolition, and set the land value of these 280,000 square feet of the finest land on the shores of Lake Michigan still existing in North Chicago at half of the price, half the actual value.

When I finally opened it just a few minutes before I came in today, I found I was right. That is exactly what happened. He says you can demolish those structures for sixty thousand dollars. You can't do it. It can't be done for that.

He put a $20 per square foot value on $50 property. You have got to deduct perhaps one mililon dollars from the total value to get yourself down to what it cost to put the property into use. You see, these things would have frustrated this whole thing. I am glad that I kept it to myself, kept it under seal. My clerk kept it. I did not even let myself get near it; the clerk kept it.

Instead of selling it at a rock-bottom sale, we have offers which have brought the property up to a practical ten-million-dollar valuation. When you add the cost of demolition to the purchase of the property it is close to a ten-million-dollar valuation.

I was unhappy with the bids that came in at first, Mr. Holleb's bid and several of the other bids that came in from the floor. They were made hurriedly. They did not have a chance to make the bids with careful scrutiny.

So, using the Court's prerogative, I stormed off the bench and said, "I am not accepting any of them. I am going to let the Trustee sell it himself." I gave him a

blanket authority. After I read the order I was worried about whether or not the order was too broad, but I looked it up and I saw that I still retained final authority. But he was given full authority to sell subject to the approval of the Court at private or public auction—private or public sale.

So I expected him to do that. Before our session in November, which was November 22nd—wasn't it—he announced to me his proposal of what he would do, that the bids were sealed, that he would open the bids in open court and allow the parties two or three hours in which to reconsider their bids and re-formulate their bids and come in with final bids which would be sealed. He did this.

He did insist, even over the objection of Mr. Haber, the young man from Securities & Exchange Commission, that these would be final bids. I considered that they were final bids. I have them here. As one reads them over word by word, one is constrained to find a phrase here or a phrase there that lends itself to an interpretation which gives it not finality but a condition, a condition subsequent.

However, on the other hand, the finality in that condition subsequent itself is something to be measured. It is true, as Mr. Stein said, that at the time Mr. Holleb bid $800,000 plus the insurance and if you were called upon at that moment to pay the insurance it would be $878,000, which at that moment would have been lower than the Shlensky bid. On the other hand, the Shlensky bid would have to face the possibility that the insurance could amount to the full $400,000 of the Trustee's claim. So that there is an area there.

I considered the bids relatively the same. It was with this in mind, when after conferring with the Trustee, the Trustee's attorney, and the attorney in charge from the Securities & Exchange Commission, I asked to be sup-

plied by each of the bidders with some additional information. This additional information was most important to me because I am not only working with the problem of an estate, the Weissberg estate, as that Weissberg estate extends across the whole of the country from Baltimore, Maryland to New Orleans, from the Lord Baltimore Hotel to the Fontainebleau, to Palm Beach, Florida and on up back to Chicago, but I am concerned with the fact that this Court is a part of the Northern District of Illinois which is also the fatherland, so to speak, or the motherland, of Chicago.

I am concerned with what is going on and what is going to happen as a result of my rulings and my determinations in this case to a great city. You may make a ruling in one case that can affect the happiness of thousands of people in a certain area of the city, that will affect the tranquillity of the entire city, and rulings of courts in equity are not confined to just the facts before them.

They are to be expanded to include the over-all concepts of decency and wisdom and equity as they affect all of the people. This is why bankruptcy courts, courts in Chapter X's and Chapter XI's, have plenary jurisdiction.

It isn't always that a dollar more here will bring a better outcome for the estate, or a dollar less here will bring a better outcome for the city. But in looking at the problem before me I wanted to be able to measure what will be the effect upon the whole of this estate, not just the very poor people and hardworkers who lost their jobs who worked out at the Edgewater Beach, but some of those hardworkers who have been laid off at the Emerson in Baltimore, Maryland; they are as interested in what happens at the Edgewater Beach as are the people who work

for the Edgewater Beach, and the people who gave credit to the management in Palm Beach, Florida, they are just as interested in what happens to the Palm Beach as those who gave credit to the Palm Beach—I mean, to the Edgewater Beach Hotel.

So I asked Mr. Gesas to ask as quickly as possible each of the bidders to write me, send a copy of the letter to Mr. Windel and one to Mr. Gesas, and tell me "What is your ultimate use? What are your plans? How do you plan to go about using this? Over what period of time will it take to implement your program?" And then, "How can you demonstrate your financial capability," not only of paying us but carrying through on their program.

I got one letter. I am concerned because I have the greatest respect for Mr. Shlensky, and I did not know that his brother had died until just yesterday. I have known them for years and years. He did not have a chance. I believe he would have had he had a chance, have answered that letter. He would have let me know.

I am satisfied with the program that has been suggested in the Holleb report, which I have had on my desk for several days, and opened just before I came in. This is not just to be another one of those slick, narrow, square, high-rise, flamboyant, sky-breaker batches of structural steel and cement and glass that desecrate the beauty of the landscape as you go north on Sheridan Road. What he has in mind will carry over many years of construction, in fact, they do not contemplate completion within three to four years.

It involves a magnificent housing development very much akin to what has been done with the Sandburg Village—I believe Sandburg Village was named—and South Com-

mons, the Juneau Village, with shopping centers, off-street parking and lower level structures, some superstructures, high superstructures with a minimum of demolition as they progress so that there will be maximum availability for use by Loyola University of the center structure until it will be the last one to be replaced.

Well, this fits closer into the dream that I had for Chicago, Mr. Holleb, I will tell you the truth, this fits closer into the dream that I had for Chicago, knowing that the maximum use out there could not be another hotel, than what I thought you had.

What I thought you had in mind was just another bunch of row houses, as I call them, row house 40-story apartment houses. If this is going to be something as you describe it, that will take its place in the place of the Edgewater Beach and lend it to the beauty of the skyline what the Beach has given it over these many years, this I like. I have nothing else to go upon. Your bid gives out tomorrow.

I am going to approve your bid. Now I had better have a little recess before I call these criminals in, hadn't I?

Mr. Gesas: Your Honor, may I ask one thing? May I have leave—

The Court: Draft me an order.

Mr. Gesas: (Continuing:) —to return other deposits subject to the claimants wanting it? We have part of it invested. They may want to take over the certificates.

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

In the Matter of:
H. R. WEISSBERG
CORPORATION,
Debtor.

No. 67B9348

MEMORANDUM DECISION AND ORDER

(Order entered January 15, 1969)

At CHICAGO, ILLINOIS, in said District and Division, on the 15th day of January, 1969.

This matter coming on to be heard by the Court on due and proper notice, on the matters more fully detailed below, in relation to which the following chronology is observed by the Court:

(1) On September 19, 1968, HARRY A. ASH, as Trustee, (hereinafter sometimes referred to as Trustee) filed an application with the Court in the pending proceeding herein under Chapter X of the Bankruptcy Act, seeking leave to sell the assets of this estate commonly known as the Edgewater Beach Hotel Property, pursuant to which an order of the Court authorized the Trustee to solicit bids.

(2) The Court set a hearing on return of bids before it on October 9, 1968, and directed that a notice in writing and by mail in the form specified by the Court be given of said hearing, to all creditors, stockholders, the Debtor, and all other parties in interest. It was provided in said order and notice that in the event no sufficient bid or bids were received at the hearing on return of bids aforesaid, that the Trustee was authorized to sell said assets at private sale without further notice to the creditors, stock-

holders and other parties in interest, but subject to the approval of the Court. The Court also ordered that a notice be published providing the general public with information regarding the sale and specifying the time and place of sale in various newspapers of general circulation and of national scope.

(3) Pursuant to order of Court, the notice and publication referred to above were given by the Trustee. The sale was advertised by him by a notice being placed for several insertions in the New York Times, the national edition of the Wall Street Journal, and in the Chicago Daily News.

(4) A hearing on return of bids was conducted before the Court on October 9, 1968, which said hearing was held, continued and conducted before the Court on October 16, 1968, at which hearings numerous bidders attended, but at the conclusion of which the Court found the bids to be insufficient and entered its order rejecting same. Contained in said order was included the Court's reaffirmation of the authority to the Trustee to sell said assets at private or public sale without further notice to creditors, stockholders or other parties in interest, but subject to the approval of the Court.

(5) Pursuant to the authority contained in said order and in the previous orders entered by the Court, the Trustee resumed his negotiations with all of the bidders known to him. As part of said negotiations and in order to provide the bidders with the greatest protection on their respective bids, the Trustee required that such new bids as might be tendered to him be sealed and agreed with the bidders that the sealed bids would only be opened in the presence of all bidders who had submitted new bids. The Trustee had been authorized by the said orders providing

him with the authority to sell, to conclude his private solicitation of bids without the necessity of further appearance in Court, excepting at such time as he would seek to obtain the final approval of the Court of the bid or bids which he might recommend. Said orders did not contemplate a resumption of bidding before the Court nor did the Court desire such resumption.

(6) The Trustee determined that it would be to the best interest of all parties concerned to conduct an opening of the sealed bids before the Court and, accordingly, he made application to the Court on November 22, 1968, seeking leave to conduct the opening of the sealed bids before the Court, which application was granted.

(7) A hearing was conducted before the Court on November 22, 1968, at the hour of 2:00 P.M., at which time the Trustee further announced that he sought leave of the Court to publicly open the sealed bids received by him in order to make said opening of bids a part of the record, and that he would then seek a recess of several hours to permit the bidders to consider any other offers which they desired to make, and that such other offers, or the offers made by the sealed bids, if such remained unchanged, would constitute the final bids for the Edgewater Beach Hotel property under the Trustee's solicitation. The Trustee represented to all bidders that he would make no further solicitation after the submission of bids at the 5:00 P.M. hearing on November 22, 1968, and that such submission would be final.

(8) The sealed bids were opened and read into the record in the presence of the Court and in the presence of all bidders at 2:00 P.M. on November 22, 1968. The hearing was then continued and resumed before the Court on said date at 5:00 P.M. At that time, each of the bidders

tendered a new bid in writing and each of which was examined and opened for the first time and read into the record by the Trustee in open court and in the presence of all bidders.

(9) The bids requiring analysis and comparison were referred to the Securities and Exchange Commission for examination and report to the Court and to the Trustee.

(10) The Securities and Exchange Commission has made its examination and has heretofore filed its report with the Court, copies of said report having been distributed to all bidders, the Trustee and other parties in interest prior to the hearing had on December 17, 1968.

(11) On December 11, 1968, the Court instructed LEONARD GESAS, as attorney for the Trustee, to communicate with each bidder, advising them that the Court requested that there be immediately sent to it by each bidder a statement setting forth the intended usage of the Edgewater Beach Hotel property and for what duration, and also evidence of the ability of the bidder to perform forthwith on the approval of the bid. Said request for a statement was communicated by an oral notice to each bidder on December 11, 1968, and was followed by notice in writing on the same date, transmitted by mail.

(12) A hearing was resumed before the Court on December 17, 1968, after due and proper notice to all bidders and the parties in interest who had filed appearances in this proceeding. At said hearing, the memorandum of the Securities and Exchange Commission of the sale of the Edgewater Beach Hotel property, the application of the Trustee previously filed with the Court relating to the solicitation of bids, the recommendations of the Protective Committee for Class A shareholders with respect to bids received for the Edgewater Beach Hotel property, the oral recommendations made in open court by various of the

parties at said hearing, the bids which had been made a part of the record of the proceeding and the statement filed by MARSHALL M. HOLLEB in response to the request of the Court setting forth his group's proposed usage of the property and the evidence of his group's ability to perform, all were considered by the Court. It appearing to the Court that the Holleb statements aforesaid were the only ones filed pursuant to the request of the Court.

The Court having considered all of the matters enumerated above and having heard the arguments of counsel and having read the pleadings and reports on file with respect to the proposed sale of the Edgewater Beach Hotel property, in addition to the oral findings announced by the Court at the conclusion of the hearing had on December 17, 1968, which are all incorporated by reference as though fully set forth herein, MAKES THE FOLLOWING FINDINGS OF FACT:

1. The Edgewater Beach Hotel real property consists of two buildings located on 288,000 square feet of lake front property in Chicago, Illinois.

2. In December, 1967, shortly after the filing of the Chapter XI petition, the hotel was closed by the then Debtor-in-Possession.

3. Prior to the institution of the Chapter XI proceeding, the hotel was damaged by fire and the Trustee claims in excess of $350,000.00 for the loss incurred under the Debtor's insurance policy, a suit for which has been filed and is now pending.

4. In August, 1968, the Trustee entered into a lease agreement with Loyola University in Chicago, whereby a portion of the Hotel premises would be used for student dormitories for a period terminating January 31, 1969.

The Trustee received $150,000.00 for said occupancy and has applied this sum to the upkeep, security and general maintenance of the property. The lease income is insufficient to pay taxes and interest on the secured debt.

5. The Trustee has estimated that the hotel could not be reopened at a cost of less than $3,000,000.00. Trustee has determined that the estate can neither afford this additional cost nor make the best economic use of the property for other purposes. The Trustee believes that it is in the best interest of the estate to sell the property.

6. The total secured claims against the said property (real estate, improvements thereon, and personal property) is about $7,000,000.00, including the accrued interest.

7. The Edgewater Beach Hotel property is the single largest piece of lake front property remaining in the northern section of the City of Chicago.

8. An appraisal of the real estate and improvements was made during the Chapter XI proceedings, pursuant to the order of Referee F. DONALD DELANEY, the Referee in Bankruptcy then administering the Chapter XI estate, which said appraisal amounted to an amount several million dollars less than the amount being realized herein.

9. A general solicitation of bids having failed to produce an adequate price, the Trustee, with authority of the Court, proceeded to negotiate a private sale subject to Court approval. Under this authority, the Trustee was authorized to set up such reasonable rules governing the bids as he deemed necessary. His designating of November 22, 1968, at 5:00 P.M. as the final time and date for the submission of bids was reasonable and well calculated to impel the bidders to make their most substantial bids for the property, and was a procedure adopted by the Trustee in order

to determine the maximum value of the property. In order to accomplish this result, the procedure of sealed bids was established, which the Trustee decided later should most appropriately be opened before the Court.

10. Four sealed bids were opened before the Court on November 22, 1968, at 2:00 P.M., and four revised bids were opened and read into the record on that date at the continued hearing at 5:00 P.M. Three of said bids proposed to purchase the Trustee's equity in the property, subject to the outstanding secured claims, and the fourth bid proposed an outright purchase of the property. The said revised bids are as follows:

(a) THE HOLLEB BID. This bid was made by one, MARSHALL M. HOLLEB, as nominee. The bid contemplated the payment of $800,000.00 for the Debtor's equity, (plus the assignment of insurance proceeds . . . or, at the option of the Trustee, an amount equal to the value of such fire loss as agreed upon between the Trustee and the buyer). No objection was raised by any party to the form of this bid when made and announced. Pursuant to this option, HOLLEB agreed to pay $200,000.00 for the insurance claim, with Trustee's approval, or a $1,000,000.00 total price. HOLLEB initially agreed to hold the estate harmless for any deficiency on the secured indebtedness, except the secured claim of vendors of certain personalty, consisting of hotel furnishings having a balance of $135,000.00. This was modified as early as the hearing on October 9, 1968, in which HOLLEB agreed with the Trustee to hold him harmless on said secured claim or to return the property to the Trustee (Tr. 10/9/68, Page 21). This was later confirmed by HOLLEB when requested to do so by the Trustee. (Holleb letter, 12/2/68)

(b) THE D'ANGELO BID. A bid was made by one, DINO D'ANGELO, as nominee, which would pay

$878,000.00 for the Trustee's equity in the hotel property. D'ANGELO would retain the insurance proceeds, but would undertake to hold the Trustee and the estate harmless for any deficiency on all of the secured indebtedness.

(c) THE SHLENSKY BID. One, HAROLD SHLENSKY, offered to pay $960,000.00 for the Debtor's equity in the hotel. The proposal did not indemnify the estate for deficiencies on the secured indebtedness. SHLENSKY would retain the insurance proceeds. After HOLLEB and the Trustee had agreed to evaluate the insurance claim at $200,000.00, and HOLLEB had agreed to pay the Trustee that amount, making his offer $1,000,000.00, SHLENSKY then reaffirmed his offer of $960,000.00, and waived any right to the insurance proceeds. In the event the insurance proceeds are valued at $200,000.00 in the hands of the Trustee, the net effect would be to make this bid as revised in the sum of $1,160,000.00, SHLENSKY also belatedly agreed to indemnify the estate and to hold the Trustee harmless against deficiencies in the same manner as HOLLEB.

(d) THE DUNBAR AND ROSENTHAL BID. One, H. M. ROSENTHAL, and DUNBAR BUILDERS CORPORATION, have offered $8,150,000.00 to the estate for the outright purchase of the Edgewater Beach Hotel property, free and clear of all liens. The terms for payment are $2,000,000.00 at closing; $2,000,000.00 two years hence; and $4,150,000.00 four years after closing.

(e) Pursuant to the request of the Court communicated to the four bidders by the attorney for the Trustee on December 11, 1968, only said MARSHALL M. HOLLEB responded by filing a statement with the Court, indicating a commitment guaranteed by a responsible life insurance company, to provide all funds required by HOLLEB to perform his bid instanter, and also filing concurrently

a statement of a magnificent program for the development of the property, coupled with an indicated participation of some of the most experienced architects and builders engaged in the real estate development business in the Chicago area. None of the other bidders provided the Court with the information as requested and gave no tangible basis for the Court ascertaining the ability of the bidder to perform his bid or the usage to be made by the bidder of the subject property. The attorney for SHLENSKY made an oral statement in the course of the hearing had on December 17, 1968, which gave no sufficient basis for the Court satisfying itself of the SHLENSKY ability to perform, and further, by express pronouncement indicated no determination of the probable usage of the property.

THE COURT MAKES THE FOLLOWING FINDINGS AND EVALUATION OF THE FOUR BIDS:

A. The proposed sale of the Edgewater Beach Hotel property was by competitive bidding and not pursuant to a plan of reorganization, although the proceeds of sale will be used toward the implementation of a plan of reorganization which may be proposed.

B. The Edgewater Beach Hotel property is one of the major assets of the estate. Such an asset may be disposed of in a Chapter X proceeding only where, as in this case, the cost of rehabilitation of the property is not feasible, the Trustee is unable to meet interest, taxes or amortization expenses, and continued ownership of the property by the estate hampers reorganization of the Debtor. The foregoing is the situation with the Edgewater Beach Hotel property, and, also, the proceeds to be realized will assist immeasurably in the working out of a plan in this estate.

C. Solicitation of bids having originally failed to produce an adequate bid in this estate, and the matter of negotiating a sale having been assigned to the Trustee herein, such reasonable ground rules as the Trustee might prescribe in order to induce the best and highest bids should be approved by the Court.

The Trustee is the arm of the Court and his commitments made in the course of negotiations for the sale of the Edgewater Beach Hotel property were authorized by the Court and in substance became the virtual undertakings of the Court. To reject conditions which the Trustee reasonably imposed would be to destroy the sanctity and integrity of a judicial sale. In addition, there are numerous other properties involved in this proceeding which, in the course of the administration of this estate, will either be required to be sold or retained as part of an ultimate reorganization. This will require that the Trustee have negotiations with numerous parties. To reject a representation and condition reasonably made by the Trustee upon which the bidders had a right to rely, and which was actually imposed for their benefit, would incapacitate the Trustee in his further negotiations in this matter, it being properly concluded by parties dealing with the Trustee that no legal sanction is given to the representations of the Trustee by the Court.

The designation by the Trustee in this regard of the 5:00 P.M. hearing on November 22, 1968, as being the final time and date of submission of bids should and does control herein. The SHLENSKY bid as made at 5:00 P.M. on November 22, 1968, is less than the HOLLEB bid of that date, considering the evaluation of the insurance claim at $200,000.00, as reserved by HOLLEB in his bid

on that date. The undertaking of December 2, 1968, of HOLLEB, in which he agrees to pay the insurance adjuster, is merely a clarification of the insurance claim net evaluation, and the undertaking with respect to the claims secured by hotel furnishings merely reiterates the HOLLEB agreement stated in open court on October 9, 1968, the first hearing on return of bids. The HOLLEB bid, as of November 22, 1968, amounts to $1,000,000.00 for the equity in the property inclusive of the insurance claim and provides indemnity to the estate as against all of the secured claims. The SHLENSKY bid of that date is $960,000.00 for the equity and the insurance claim, but does not provide indemnity against the secured claimants. Such additional bid as made by SHLENSKY after the close of bidding on November 22, 1968, the Court finds that under the circumstances should not be considered for the reasons assigned above. The Court also finds that the value being placed on the insurance claim by SHLENSKY is purely speculative in the hands of the Trustee, and that SHLENSKY has not offered to pay for same on the HOLLEB basis. The bids of HOLLEB and SHLENSKY are higher than that of D'ANGELO. In addition, at the hearing had on December 17, 1968, the D'ANGELO bid was announced as having been withdrawn. DUNBAR and ROSENTHAL have offered $8,150,000.00 to the estate for the outright purchase of the Edgewater Beach Hotel property, free and clear of all liens, including the insurance claims. DUNBAR contemplates that it will take full possession of the property in four years. Upon closing, it will take one-third of the property and pay $2,000,000.00; in two years, another one-third, and will pay $2,000,000.00; and in four years, the remaining one-third, and pay $4,150,000.00. DUNBAR will pay all taxes, maintenance and insurance from the date of closing and pay interest

on its unpaid balance equal to the accruing interest of the balance of outstanding mortgagos. However, since an equity will not be realized for four years, the bid must be discounted to present day worth. Considering the total secured indebtedness on the Edgewater Beach Hotel property as $7,000,000.00, this would leave an equity for the Trustee of $1,150,000.00. Discounting the $1,150,000.00 to present day values results in a value of $877,329.00, using a 7% discount rate, thus, using a prime rate, putting DUNBAR in its most favorable position, still results in a figure far below the value offered by HOLLEB or SHLENSKY. In addition, to consider the DUNBAR proposal, there arises a great many contingencies for the estate. Among those contingencies is the willingness of the mortgagees to give partial releases of their security, the maintenance of the estate in Chapter X for at least four more years, and the costs of administration during this time. In addition, absent the consent of the mortgagees, a disposition of the property on the DUNBAR terms would have to be accomplished under a plan of reorganization wherein the consent of the mortgagees could be dispensed with by affording them adequate protection. However, this would force the Trustee into an extended period of operation of the Hotel property which appears to be wasting asset under his operation and would seriously deplete the estate.

Based on a consideration of all of the foregoing, the Court finds that the bid of MARSHALL M. HOLLEB, as set forth in Exhibits A to D, both inclusive, attached hereto and made a part hereof, is the highest and best bid received by the Court as of November 22, 1968, at 5:00 P.M., on the offering authorized by the Court and

made by HARRY A. ASH, as Trustee herein; that said MARSHALL M. HOLLEB is the only bidder who has demonstrated to and satisfied the Court of his ability to perform on his bid and that, in addition thereto, the HOLLEB program as communicated to the Court will involve a magnificent housing development which will further beautify the northern Chicago lake front, and will not desecrate it, and will lend itself to the beauty of the skyline; the Court also finds that the HOLLEB bid expired on December 18, 1968, and that a decision was required before the expiration of the offer on that date. The Court further finds that in light of the appraisal of the subject property made with authority of the Court during the pendency of the Chapter XI proceeding, the HOLLEB bid is an adequate bid with respect to the values placed on the subject property. The Court further finds that under the circumstances, all other bids, excepting the HOLLEB bid should be ordered rejected, and that the HOLLEB bid should be ordered accepted.

THE COURT FINDS AS ITS CONCLUSIONS OF LAW THAT:

1. The involuntary petition under Chapter X having been approved herein, the Judge in this proceeding had the jurisdiction and power to authorize the Trustee, upon the notice heretofore prescribed, and upon cause having been shown as set forth above by reason of the wasting nature of the property in the Trustee's possession and the inability to retain said property for the purpose of the plan of reorganization, to sell the property of this estate commonly known as the Edgewater Beach Hotel property, upon such terms and conditions as the Judge approved.

2. The solicitation of bids and the rejection of those bids originally received were within the jurisdiction and power of the Judge.

3. The delegation by the Judge of further solicitation of bids by the Trustee by private negotiations, this eventuality having been forecast as a possibility and a procedure in orders and notices previously issued in this proceeding, and permitting the Trustee to establish his rules of sale were within the discretion of the Judge.

4. The conditions placed by the Trustee respecting the manner and time of bidding were a necessary corollary to the delegation of authority to the Trustee to privately solicit bids subject to the ultimate approval by the Judge.

5. To disregard the setting of the closing time by the Trustee for the solicitation of bids as of November 22, 1968, at 5:00 P.M., wherein such conditions were imposed for the protection of all bids and were without objection of any of the bidders, and where as a result of the procedures adopted by the Trustee, almost double the appraised value of the property has been realized, would be for the Court to act in derogation of the authority granted to the Trustee and would constitute an abuse of discretion.

6. The direction to all bidders that they submit evidence of their ability to perform on their respective bids, and that they further submit a statement as to their proposed usage of the property and for what duration, were within the jurisdiction and the power of the Judge to prescribe.

7. The bid of MARSHALL M. HOLLEB, under all of the legal considerations applicable, was the highest and

best bid and should be ordered accepted by the Court; all other bids, in consideration of said legal standards, should be rejected.

NOW, THEREFORE, the Court having considered the matters before it relating to the sale of the property, both real, personal and mixed, known as the Edgewater Beach Hotel Property, and having made the findings of fact and conclusions of law provided herein,

DOES HEREBY ORDER, ADJUDGE AND DECREE;

1. The bid of MARSHALL M. HOLLEB, as nominee, as set forth in Exhibits A-D, both inclusive, attached hereto and made a part hereof, be and the same is hereby approved and ordered accepted by HARRY A. ASH, Trustee herein, subject to the conditions of sale announced by the Trustee at the hearing on return of bids had herein on October 9, 1968, as follows:

(a) The legal description of the real estate being sold herein is as set forth in Exhibit E, attached hereto and made a part hereof.

(b) The sale is specifically made subject to the Loyola lease heretofore mentioned, which said lease terminates on January 31, 1969. All rentals to be prorated as of the date of the delivery of the deed and the payment of the amount of the HOLLEB bid to the Trustee, both conditions having occurred.

(c) None of the contents of the various stores, restaurants or the beauty parlor, the same constituting third party property, is part of this sale.

(d) The personal property being sold herein, as listed in an inventory on file with the Court previously prepared by the Debtor while Debtor-in-Pos-

session, shall constitute the personal property being sold, provided, however, that no warranty is made with respect to the correctness of said inventory except that the Trustee has represented that he believes it to be reasonably correct.

(e) There is specifically excluded in the offering of personal property by the Trustee that property to which Automatic Retailers of America have title. Said Company is presently acting as a food purveyor for the Loyola University students who are residing in the hotel.

(f) The offering does include the right, title and interest of the Trustee in the use of the name, "Edgewater Beach Hotel" and the good will attached thereto.

2. The Trustee be and he is hereby authorized to execute and deliver on behalf of this estate such deeds, bills of sale or other documents as may be necessary to effect a transfer of title to the real estate and personal property being sold hereunder, without the further order of the Court.

3. The Trustee be and he is hereby authorized to obtain a Chicago Title and Trust Company Title Insurance Commitment, ALTA Form, insuring the fee simple title to the subject real estate in the name of MARSHALL M. HOLLEB, or his nominee, in an amount equal to the total face value of all liens and encumbrances and the cash purchase price, and subject only to those exceptions to title set forth in Paragraphs 2(a) through and including 2(g) of the Exhibit "A" bid letter dated November 22, 1968, attached to this Order.

The Trustee is further hereby authorized to incur the expense and costs of such title policy and all required

transfer stamps, and to discharge said expense and costs when incurred.

4. IT IS FURTHER ORDERED that MARSHALL M. HOLLEB, as nominee, be and he is hereby directed to pay to HARRY A. ASH, as Trustee, the amount of his bid in full, less the amount of earnest money deposit, concurrently with the tendering to him of (a) the Chicago Title and Trust Company commitment to issue title policy described at Paragraph No. 3 immediately above, (b) a deed from the Trustee for the subject real estate, and (c) a Bill of Sale from the Trustee for the personal property.

5. All other bids excepting that of MARSHALL M. HOLLEB, as nominee, be and the same are hereby ordered rejected.

6. All restraining orders previously entered in this proceeding while pending under Chapter X or Chapter XI of the Bankruptcy Act relating to the stay of any action by a secured creditor or any other party in interest having a security interest against the property, real or personal, being sold hereunder to MARSHALL M. HOLLEB, be and the same are hereby ordered dissolved as of the date of the payment of the purchase price in full by MARSHALL M. HOLLEB to the Trustee, and the transfer of possession by the Trustee to said MARSHALL M. HOLLEB of said property.

7. The Court retains jurisdiction over the property and parties provided for herein to enter such supplemental orders as may be required to consummate the sale herein.

15 January, 1969

ENTER:

James B. Parsons

United States District Judge

EXHIBIT "A"

November 22, 1968

Mr. Harry A. Ash
100 West Monroe Street
Chicago, Illinois

In Re: Estate of H. R. Weissberg Corp.
#67 B 9348—Edgewater Beach Hotel
Real Estate and Personal Property

Dear Mr. Ash:

As nominee on behalf of clients of our office, I hereby submit to you a proposal to purchase all the real estate and personal property generally known as the Edgewater Beach Hotel, Chicago, Illinois, upon the following terms and conditions:

1. *Purchase Price.* The purchase price to be paid to the Trustee for its right, title and interest in such property shall be $800,000.00, in cash, plus the assignment of insurance proceeds of a previous fire loss or, at the option of the Trustee, an amount equal to the value of such fire loss as agreed upon between the Trustee and the buyer. Such amounts shall be payable upon delivery of good title to such property in the manner herein described.

2. *Liens and Encumbrances.* The conveyance of such real estate and personal property shall be subject only to:

A. Any and all real estate taxes accrued and unpaid to date.

B. A first mortgage dated July 1, 1957, held by Connecticut Mutual Life Insurance Co., having an approximate unpaid principal balance of $1,834,488.00 plus accrued interest.

C. A junior mortgage dated September 25, 1962, to Chicago Edgewater Beach Hotel Corp. and Edgewater Beach Co., Inc., and assigned to the Boston Foundation, having an approximate principal balance of $3,995,062.00 plus accrued interest.

D. A third mortgage to the Edgewater Beach Hotel Employees Pension Trust, having an approximate principal balance of $364,585.00, plus accrued interest.

E. Mechanic liens against the property with a total face value claim of approximately $116,950.86, plus accrued interest.

F. Usual and customary exceptions of title as generally set forth in Chicago Title and Trust Company ALTA Title Insurance Policy.

G. Possession of Loyola University, under a lease dated August 26, 1968, between you and Victor Axelrod, for a period up to January 31, 1969, or until such further time as the buyer and the Trustee can agree upon and which is consonant with the buyer's reasonable development program.

3. *Indemnification.* The above-captioned estate shall be indemnified against any claims which may be made against it by any of the holders of any of the liens and encumbrances described above.

4. *Earnest Money Deposit.* This offer is accompanied by an earnest money deposit of $100,000.00, in cash, which amount shall be applied to the purchase price upon consummation of the sale in the manner herein provided. In the event the sale is not consummated because of the fault of the buyer, the earnest money shall be retained by the estate as liquidated damage. In the event the sale is not consummated through no fault of the buyer, the buyer

may, at its option, elect to obtain a refund of the deposit, in which case the agreement of sale shall be null and void. The earnest money shall be invested by you in short term treasury bills and at the time of closing the net earnings shall be credited or refunded to the buyer.

5. *Closing of Sale.* The closing of the sale shall take place within a reasonable period of time after acceptance of the offer. The closing of the sale and the payment of the balance of the purchase price shall be upon delivery of good title. Evidence of good title shall be a Chicago Title and Trust Title Insurance Commitment, ALTA Form, insuring the fee simple title to the real estate in the name of the undersigned, or its nominee, in the amount equal to the total face value of all liens and encumbrances and the cash purchase price, and subject only to the exceptions to title herein described. The cost of such title policy and all transfer stamps shall be borne by you. Utility bills, rents and other items customarily prorated shall be prorated as of the date of closing.

6. *Time Limit of Offer.* Unless this offer is accepted on or before 5:00 P.M., December 18, 1968, this offer shall automatically become null and void and of no further force and effect and all earnest money paid hereunder shall be refunded. This offer shall be deemed accepted upon delivery to the undersigned of an order of the District Court approving same.

Upon acceptance of this offer, I am prepared to work with you to arrange for an expeditious completion of the sale.

Very truly yours,

/s/ *Marshall M. Holleb*
Marshall M. Holleb
As Nominee

EXHIBIT "B"

November 27, 1968

Mr. Harry A. Ash
100 West Monroe Street
Chicago, Illinois

In Re: Estate of H. R. Weissberg Corp.
#67 B 9348—Edgewater Beach Hotel
Real Estate and Personal Property

Dear Mr. Ash:

On November 22, 1968 the undersigned, as nominee on behalf of clients of our office, submitted to you a proposal to purchase all of the real estate and personal property generally known as the Edgewater Beach Hotel, Chicago, Illinois, and upon terms and conditions set forth in that letter. Included among the terms and conditions was a purchase price described as follows:

Purchase Price The purchase price to be paid to the Trustee for its right, title and interest in such property shall be $800,000.00, in cash, plus the assignment of insurance proceeds of a previous fire loss or, at the option of the Trustee, an amount equal to the value of such fire loss as agreed upon between the Trustee and the buyer. Such amounts shall be payable upon delivery of good title to such property in the manner herein described.

We have since had an opportunity to review the value of the insurance claim to which we referred in connection with our purchase price. Accordingly, we do herewith agree to purchase such fire loss from the Trustee for the price of $200,000.00. That amount is to be added to the $800,000.00 in cash above referred to, making a total purchase price of $1,000,000.00.

All the rest and remainder of our offer of November 22, 1968, shall be the same as therein set forth.

Very truly yours,

/s/ *Marshall M. Holleb*
Marshall M. Holleb
As Nominee

EXHIBIT "C"

December 2, 1968

Mr. Harry A. Ash
100 West Monroe Street
Chicago, Illinois

Re: Estate of H. R. Weissberg Corp.
67 B 9348—Edgewater Beach Hotel
Real Estate and Personal Property

Dear Mr. Ash:

In connection with the undersigned's offer to you to purchase the above-captioned property pursuant to a letter dated November 22, 1968, as amended by a letter dated November 27, 1968, you should be advised that in connection with the personal property included in the sale, a portion of which is subject to security interests as described in the attached exhibit, the undersigned will either hold you harmless against any claim by such security holders in the event the undersigned desires to retain such personal property, or if the undersigned desires not to retain such personal property, such property will be returned either to the Trustee or to the holder of the security interest.

We trust that the above information will clarify any ambiguity in the undersigned's offer.

Very truly yours,

/s/ Marshall M. Holleb
Marshall M. Holleb
As Nominee

IV. CLAIMS OF SECURITY INTEREST OR TITLE AGAINST PERSONAL PROPERTY IN ADDITION TO THOSE CLAIMED BY REAL ESTATE MORTGAGE HOLDERS AS NOTED ABOVE.

A. HARRY C. STEIGMAN EQUIPMENT CO.—$134,599.50 and accrued interest. (Purchase money security interest in furniture, carpeting, etc., located in the main building, not specifically referred to in inventory.)

B. DECOR GLOW LAMP CO.—Claims title to 150 electric rechargeable nickle battery lamps and five charging units for batteries in said lamps. Page 247 of inventory, item No. 2.

C. THOMAS INDUSTRIES, INC.—Claims title to chandelier in entrance of main building.

D. SHELBY WILLIAMS INDUSTRIES, INC.—Security interest in certain chairs to secure $2,061.00.

E. CAPITOL LEASING COMPANY—Conditional sales contract in certain office equipment with a balance of $1,144.28. Page 70, Items 1 to 3, inclusive, of inventory.

F. SPALTER FINANCE CO.—Security interest in ice machine and storage bin to secure $6,009.00. Page 27, Item 19, and Page 56, items 31 and 32, of inventory.

G. GIDEONS INTERNATIONAL—Title to Bibles.

H. AMETEK, INC.—Security interest in extractor, to secure a balance of $3,974.78. Page 77, Item No. 10 of inventory.

I. WHITE WAY SIGN CO.—Claims title to two single face signs with attraction sign canopy and sign on canopy to bar.

J. AUTOMATIC RETAILERS OF AMERICA, who are acting as food purveyors for the Loyola students on the premises, have loaned certain equipment in conjunction with their operation, which is third party property. The same does not appear on the inventory and is not included in the sale.

EXHIBIT "D"

December 2, 1968

Mr. Harry A. Ash
100 West Monroe Street
Chicago, Illinois

Re: Estate of H. R. Weissberg Corp.
#67 B 9348—Edgewater Beach Hotel
Real Estate and Personal Property

Dear Mr. Ash:

In connection with the undersigned's offer to you to purchase the above-captioned property pursuant to a letter dated November 22, 1968, as amended by a letter dated November 27, 1968, you should be advised that the undersigned in electing to purchase the fire and any and all other loss claims, including causes of action relating thereto, against Phoenix Insurance Company and any other in-

surance companies which may be involved, agrees to pay any adjustor's fees which may become due to Adjustments Unlimited, Inc., out of the proceeds of such losses.

It is the undersigned's further understanding that the Trustee agrees to assume any and all expenses in connection with such adjustor's activities up to and including the date of the closing of the sale.

Very truly yours,

/s/ *Marshall M. Holleb*
Marshall M. Holleb
As Trustee

EXHIBIT "E"

THIS COMMITMENT REFERS TO PROPERTY DESCRIBED AS:

The North 1207.75 feet of the South 2032 feet of that part of the East half of the North East fractional quarter lying West of boundary line of Lincoln Park as established by Decree entered July 6, 1908 in Case 285574 Circuit Court of Cook County, Illinois and shown on plat recorded July 9, 1908 as document 4229498 (except the West 47 feet thereof) in Section 8, Township 40 North, Range 14, East of the Third Principal Meridian; excepting from the aforesaid described property that part lying North of a line 971 feet South of the North line of the North East quarter of Section 8, Township 40 North, Range 14, East of the Third Principal Meridian, lying West of the West boundary line of Lincoln Park as established by decree entered July 6, 1908 in Case 285574 Circuit Court as shown on plat recorded July 9, 1908 as document 4229498 (except therefrom the West 47 feet thereof heretofore condemned as part of Sheridan Road) in Cook County, Illinois.

In the

United States Court of Appeals

For the Seventh Circuit

APRIL 25, 1969

Before SWYGERT, FAIRCHILD and CUMMINGS, *Circuit Judges.*

FAIRCHILD, *Circuit Judge.* Appeals from an order of the district court approving a sale in a chapter X reorganization proceeding. The appellants are bidders whose bids were rejected.

The debtor, H. R. Weissberg Corporation owns several hotels, including the Edgewater Beach Hotel at Chicago. The trustee concluded and the court decided that sale of the Edgewater Beach property other than pursuant to a plan of reorganization is appropriate. No one challenges this conclusion nor the underlying evaluation of circumstances.

The Edgewater Beach property is subject to encumbrances totalling about $7,000,000, including three mortgages, a furniture security agreement, mechanics' liens, and taxes. The property had been damaged by fire. The trustee has brought action against the insurer in which the trustee claims in excess of $350,000. The insurer appears to have offered some $72,000. In September, 1968 the trustee received an offer of $100,000 for his equity, if the trustee kept the insurance claim; $200,000, if the buyer got it. The buyer would also indemnify the trustee from lienholders' claim for deficiency.

The court ordered a sale October 9; it was widely advertised and bidding took place before the court. There

was no bid for the property free and clear of encumbrances. The highest bid received was $410,000 for the equity, with the buyer receiving the insurance claim, but without the buyer's agreement to indemnify. The court rejected all bids and authorized the trustee to sell at public or private sale, subject to court approval.

The trustee elected to invite sealed bids, to be opened at a hearing before the court November 22. Counsel for the trustee announced that after he opened and read the bids there would be a recess, after which a further bid could be made, followed by evaluation of the bids. Later in the hearing he said: "I think the spirit and the basis upon which these bids are being offered today are with finality."

During the course of the transactions referred to, from September 6 to November 22, the bids were for the trustee's equity in the property, except for one bid (Rosenthal and Dunbar) for the property free and clear of encumbrances. Some of the bids for the equity contemplated that the purchaser would receive the fire insurance claim, but some did not. Some of the bids for the equity included an agreement by the bidder to indemnify the estate from claims for deficiency on behalf of holders of encumbrances. Trustee's counsel had indicated that the indemnity agreement had significant value to the estate. The variations just referred to made comparison of bids difficult.

The bid which the court approved and ordered the trustee to accept is referred to as the Holleb bid, since Attorney Marshall M. Holleb is the nominee for the bidders. As presented after the recess November 22, it was an offer of $800,000 for the trustee's equity, and included an agreement to indemnify. With respect to the insurance claim, it was in the alternative: the trustee

could keep the insurance claim, or could transfer it to Holleb at a price to be mutually agreed upon. By letter dated November 27, the Holleb bidders agreed to pay the trustee's price of $200,000 for the insurance claim. Letters dated December 2 further supplemented or clarified the Holleb offer in respects which need not be considered here. He had deposited $100,000 November 22.

Appellant Shlensky, whose last November 22 bid was $960,000 for the equity and the insurance claims, without an agreement to indemnify, asserts that his bid, as made or modified December 6, should have been deemed highest and best. He asks that we reverse, with directions to order his December 6 bid accepted. It was an offer of $960,000 for the equity, with the trustee permitted to retain the insurance claim, and with an agreement by Shlensky to indemnify. He had deposited $25,000 November 22, but increased it to $100,000 December 6.

Appellants Rosenthal and Dunbar do not assert that their free and clear bid, made November 22, was highest and best. They argue that under the circumstances the sale was not fair and impartial; that we should reverse with directions to re-open the sale "subject to firm and specific guide lines."

Four bids were submitted November 22: Holleb, Shlensky, Rosenthal-Dunbar, and D'Angelo. It is unnecessary to consider the details of the latter two. Rosenthal and Dunbar bid $8,150,000, free and clear, with the final payment in four years. D'Angelo bid $878,000 for the equity, would receive the insurance claim, and would indemnify. He announced withdrawal at the hearing on confirmation. No one challenges the conclusion that Rosenthal-Dunbar and D'Angelo were inferior to the other two. Holleb's November 22 bid was better than Shlen-

sky's of the same date with respect to the indemnity provision and the deposit of earnest money. One can only determine whether the Holleb offered price was higher by assigning a liquidation figure to the insurance claim. If one chooses the $72,000 insurance company offer, the Shlensky price was higher. If one assigns any figure above $160,000 to the insurance claim, the Holleb price was higher.

November 27, after the close of the hearing, Holleb agreed to a $200,000 figure for the insurance claim. At least in form, he could argue that this was merely a filling in of his November 22 offer.

On December 6, Shlensky changed his November 22 offer by permitting the trustee to keep the insurance claim, giving an agreement to indemnify, and increasing his deposit. Comparing Shlensky's December 6 bid with Holleb's November 22-27 bid, the two are the same with respect to indemnity and deposit. In order to compare the price, it is again necessary to assign a liquidation figure to the insurance claim. Assigning the $72,000 figure, the Shlensky price is higher by $32,000, and assigning higher figures will produce a greater difference in favor of the Shlensky bid.

On December 11, the trustee's attorney, at the request of the court, asked each bidder to state the use it intended to make of the property and to give evidence of the bidder's ability to perform on approval of the bid. Holleb was the only bidder who replied. His letter named the architects who had been engaged, described their preferred concept for development of the site for residential use, and estimated the times at which portions of the project would be started and completed. Shlensky's counsel stated

orally at the hearing on confirmation that he had been unable to reach a conclusion as to the best use for the property.

The December 6 Shlensky bid would produce a higher price than the November 22 Holleb alternative under which the trustee would keep the insurance claim. It seems probable that the December 6 Shlensky bid would also produce a higher price than the Holleb alternative under which Holleb would take the insurance claim in return for $200,000 (the bid which the district court approved).

The trustee had sought to make November 22 the final bidding day, and takes the position that this maneuver was responsible for bringing out much better bids than previously obtained. The district court was faced with the question of how much weight to give to the concept of finality as against the improvement in price represented by Shlensky's tardy offer, and the question whether the same concept of finality would prevent considering Holleb's specification, on November 27, of the amount in the alternative which he had left open to negotiation November 22.

Counsel for the Securities and Exchange Commission, whose recommendations had been invited by the court, took the position while the matter was under consideration in the district court that the December 6 Shlensky bid "is $160,000 more than the Holleb bid (assuming the $200,000 value for the insurance claim agreed upon by the Trustee and Holleb)" and that "We know of no reason . . . why [the court] may not, in its discretion, accept modifications of the earlier bids which result in a higher price and greater benefit to the estate." The commission has taken no position in this court on appeal.

After a hearing, at which the district court announced its decision to approve the Holleb bid, detailed findings, conclusions and order were filed. It is apparent that in exercising his discretion the district judge gave weight to the concept of finality as tending to maintain the sanctity and integrity of a judicial sale. He concluded, however, that the Holleb communication subsequent to November 22 could reasonably be deemed a clarification of the Holleb November 22 bid, so that the bid as so supplemented could be considered consistently with the concept of finality; Shlensky's December bid, however, was reasonably deemed a new bid, consideration of which would undermine the concept of finality. The district judge also gave weight to the fact that only Holleb had responded to the request for a plan of development and showing of ability to perform, and had supplied evidence of a commitment of a responsible life insurance company to provide required funds.

No claim has been made that the November 22 bids were inadequate. Indeed, as noted by the district court, an appraisal made during the chapter XI proceeding which immediately preceded the chapter X proceeding had valued the property, apparently after the fire loss, at $5,100,000, considerably less than the encumbrances.

The sale, having been confirmed, can only be set aside for an abuse of discretion.[1] We are unable to find an abuse of discretion under the circumstances disclosed by this record.

The policy of giving great weight to observing the finality of the bidding day has long been recognized.

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[1] *In re Webcor, Inc.* (7th Cir., 1968), 392 F.2d 893, 898.

In England, it was formerly the rule that bidding would be reopened until confirmation upon an offer to advance the price.

> "But Lord Eldon expressed much dissatisfaction with this practice of opening biddings upon a mere offer of an advanced price, as tending to diminish confidence in such sales, to keep bidders from attending, and to diminish the amount realized."[2]

Parliament responded to the problem noted by Lord Eldon by passing the Sale of Land by Auction Act which provided that the highest bidder at a sale by auction would be declared the purchaser in the absence of fraud or other improprieties.[3] This rule was adopted by the great majority of American courts. The rule is an expression of the general policy that the setting of cut-off dates for the receipt of bids will, in the long run, produce better bids with the least delay.

A number of cases do hold that the district court has discretion to reopen the bidding where the highest bid before the cut-off date is inadequate and a later higher bid is made. In such situations, the district court may order the property sold to the later, higher bidder.[4] These cases do not hold that the court must order the property sold to the later, higher bidder. They merely say that the court may order the property sold to him.

Appellants have argued that the district judge should not have given weight to the fact that he was favorably

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[2] *Graffam* v. *Burgess* (1886), 117 U.S. 180, 191, 29 L.Ed. 839, 842-43.

[3] Id.

[4] *Shipe* v. *Consumers' Service* (7th Cir., 1928), 29 F.2d 321; *Reid* v. *King* (4th Cir., 1946), 157 F.2d 868.

impressed by the type of project described by Holleb as the "preferred concept" of the architects engaged by this group. The judge did express enthusiasm for the type of project described in view of the fact that the Edgewater Beach property is a choice location on Chicago's lake front. There are some circumstances under which a court may consider the fact that a particular bidder will make a use of the property which serves community interest.[5] We think favorable consideration of the type of development under consideration by the Holleb group was no more than a "make weight" here, and did not exceed proper bounds.

We can not agree that the fact that the bidders were not required, by advance prescription, to make offers on identical, or alternative sets of, conditions, nor the fact that the Holleb November 22 offer had an alternative subject to later negotiation, which was carried out, so undermine the integrity or dignity of the sale that it was an abuse of discretion not to reopen it under more specific pre-conditions.

The record discloses that in September the trustee received an offer (from Holleb) of $100,000 for the equity, the trustee keeping the insurance claim, or $200,000, the purchaser taking it, with an indemnity by the purchaser in either event. A sale before the court on October 9 was widely advertised. It was conducted as an auction. The high bid was $410,000 for the equity, the purchaser taking the insurance claim, but without indemnity. Shlensky and Holleb were the only bidders, but several others expressed an interest. The trustee explained his interest in an indemnity provision.

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[5] *In re Prairie Coal Co.* (E.D.Ill., 1941), 40 F.Supp. 895.

The Rosenthal-Dunbar free and clear offer ($8,000,000, with final payment in four years) was thereafter received and was considered November 22. The three original sealed bids for the equity were: D'Angelo—$400,000, the purchaser taking the insurance claim and giving indemnity; Holleb—$775,000 on the same conditions; and Shlensky $700,000, the purchaser taking the insurance claim, but not giving indemnity. After the recess the Holleb and Shlensky bids were revised as already stated; D'Angelo's bid was raised to $878,000 and Rosenthal-Dunbar to $8,150,000.

The hotel operation ceased some time ago, the property is expensive to maintain, and a lease to a temporary tenant (Loyola University) expired January 31.

The results of the efforts from September 6 to November 22 were highly successful for the estate. Although only a few serious bidders came forward, there appears to have been full opportunity for interested persons to bid. We think the district court resolved the questions presented in a manner which can not be said to be an abuse of discretion.

When the urgency of these appeals was brought to the attention of this court by motion, this court expedited the filing of briefs, heard oral argument April 2 and entered its judgment affirming the order April 4, 1969, noting that this opinion would be filed.

Nos. 17432, 17433.

SWYGERT, *Circuit Judge,* dissenting. Several circumstances, I believe, require a reversal. The lack of conditions and ground rules prescribed in advance of receiving bids, the unequal treatment accorded the unsuccessful bidders, especially Shlensky, and the reliance upon extraneous esthetic considerations created a situation sur-

rounding the sale that was so irregular as to amount to a gross abuse of discretion on the part of the district judge.

Initially, a public sale of the Edgewater Beach Hotel was ordered for October 9, 1968. The court rejected all bids received on that date as being insufficient in amount and authorized the trustee to sell the hotel at private sale without notice, but subject to the approval of the court. Thereafter, at a hearing held on November 22, 1968 at 2 P.M., four sealed bids were received and opened in court. Counsel for the trustee then requested a recess for the purpose of receiving amended bids. Three hours later the hearing was resumed. In response to a question from the attorney representing the Securities and Exchange Commission, the trustee announced that "this is the final bidding hour as far as the trustee is concerned, unless the court shall direct otherwise."

At the resumption of the hearing revised bids were received. Holleb bid $800,000 for the trustee's equity and assignment of the fire loss claim proceeds or "at the option of the trustee, an amount equal to such fire loss as agreed upon between the trustee and the buyer." He also offered to indemnify the estate against claims of those holding liens on the real estate. Shlensky bid $960,000 for the trustee's equity, including whatever might be the fire loss claim proceeds. Dunbar bid $8,150,000 for the hotel property, free and clear of liens and encumbrances.

Before adjournment, the attorney for the Securities and Exchange Commission inquired whether it would be acceptable if any of the bidders increased their cash offer during the time the bids were under consideration. The trustee said that it would not be acceptable. The judge then said, "I think the position I understand the trustee to have taken is that as far as the trustee is

concerned he is finished with asking for bids." The hearing was adjourned until a date in December in order to provide time for consideration of the bids.

On November 27, four days after the close of the bidding, Holleb wrote the trustee that he would agree to purchase the fire loss claim for $200,000. He stated in his letter, "That amount is to be added to the $800,000 in cash above referred to, making a total price of $1,000,000." On December 2 Holleb again wrote a letter to the trustee in which he agreed to indemnify the estate for secured claims against the personal property owned by the hotel. The first part of the letter read, "In connection with the undersigned's offer to you to purchase the above-captioned property pursuant to a letter dated November 22, 1968 as *amended* by a letter dated November 27, 1968 you should be advised. . . ." (Emphasis added.)

Upon learning of Holleb's November 27 and December 2 letters to the trustee, Shlensky on December 6 wrote the trustee that he reaffirmed his previous bid of $960,000, "but I hereby waive any rights to the insurance claim proceeds and I agree that the proceeds of said uncollected fire loss (valued at $200,000 by the trustee and Holleb) shall remain the property of the Estate of H. R. Weissberg Corp. . . . The net effect of this proposal is to increase the benefit to the estate by the amount of the fire loss proceeds realized by the pending litigation, which as I have indicated the trustee and Holleb have valued at $200,000 and therefore my proposal is in effect $1,160,000 insofar as the estate and the creditors thereof are concerned." Shlensky also agreed to indemnify the estate against any secured claims asserted against either the personal property or real estate of the hotel.

Dunbar did not change its bid after November 22.

On December 17, 1968 another hearing was held before the district court. Prior to the hearing, both the S.E.C. and the Creditors' Protective Committee recommended acceptance of the Shlensky bid. At the hearing, counsel for the S.E.C. and the Protective Committee adhered to their recommendations. The trustee's attorney analyzed the bids in the light of the letters written to the trustee by Holleb and Shlensky subsequent to the November 22 hearing. The trustee also addressed the court as did Holleb and counsel for Shlensky. At the conclusion of the hearing the judge announced that he approved the Holleb bid and directed the trustee's attorney to draft an order in accordance with his decision.

In his "memorandum decision" and order entered January 15, 1969 confirming the sale of the hotel to Holleb, the district judge made a number of findings of subsidiary determinations. One is particularly important; it reads in part:

> The designation by the Trustee in this regard of the 5:00 P.M. hearing on November 22, 1968, as being the final time and date of submission of bids should and does control herein. The SHLENSKY bid as made at 5:00 P.M. on November 22, 1968, is less than the HOLLEB bid of that date, considering the evaluation of the insurance claim at $200,000.00, as reserved by HOLLEB in his bid on that date. The undertaking of December 2, 1968, of HOLLEB, in which he agrees to pay the insurance adjuster, is merely a clarification of the insurance claim net evaluation, and the undertaking with respect to the claims secured by hotel furnishings merely reiterates the HOLLEB agreement stated in open court on October 9, 1968, the first hearing on return of bids. The HOLLEB bid, as of November 22, 1968, amounts

to $1,000,000.00 for the equity in the property inclusive of the insurance claim and provides indemnity to the estate as against all of the secured claims. The SHLENSKY bid of that date is $960,000.00 for the equity and the insurance claim, but does not provide indemnity against the secured claimants. Such additional bid as made by SHLENSKY after the close of bidding on November 22, 1968, the Court finds that under the circumstances should not be considered for the reasons assigned above. The Court also finds that the value being placed on the insurance claim by SHLENSKY is purely speculative in the hands of the Trustee, and that SHLENSKY has not offered to pay for same on the HOLLEB basis.

It is apparent from the above quoted language that the judge determined in effect that the Holleb bid on November 22 included the amount of $200,000 representing the value of the fire loss claim. But an analysis of Holleb's original bid together with his subsequent letters demonstrates that this is not the fact. Holleb's bid on November 22 included no specific amount for the insurance claim. Instead, it provided in terms for the payment of $800,000 in cash "plus the assignment of insurance proceeds of a previous fire loss or at the *option* of the trustee, an amount equal to the value of such fire loss *as agreed upon* between the trustee and the buyer." (Emphasis added.) Even Holleb himself in his December 2 letter considered the $200,000 offer for the fire loss claim an "amended" bid. Although the judge afforded Holleb's December 2 bid nunc pro tunc treatment, he refused to treat Shlensky's amended December 6 bid on the same terms. In effect he ruled that November 22 was the final bidding date for Shlensky while at the same time he permitted Holleb to subsequently amend his bid. The judge had no warrant for such unequal treatment of the competing bidders. His ruling was

wholly inequitable and irregular; it had no lawful basis in light of the facts before him.

If we look at the proceedings and events between October 9 and December 17 in their entirety, the inescapable conclusion is that no guidelines were prescribed by the district judge as to the content of the bids which were to be submitted, the procedure for such submission, and most importantly when the bids were to be considered final.[1] The sale was neither public nor private but an improvisation.

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[1] This fact was brought to the attention of the district judge at the December 17 hearing. The attorney representing the S.E.C. made the following comment:

> Now, I don't say that there was anything wrong with the provision that he put in the bid, but the very fact that there was the option whereby he could agree with the trustee as to the value of the fire loss did not permit the Holleb offer to be amended after all of the others had been received, which is exactly what was done.

The attorney for the debtor commented:

> I would suggest to your Honor that through no fault of the Court or of the trustee or, for that matter, of the debtor and perhaps by the design of the bidders, the rules have become a little bit fuzzy so that we are not clear at this point just what the rules of the game are.
>
> * * *
>
> I know your Honor has expressed a reluctance before to have bidding in open court, but it appears to me that we should not be bidding apples against oranges here, that we should be bidding apples against apples, that we should set up ground rules here and now.

Even the trustee recognized that the procedure lacked guidelines. He stated:

> I ask your Honor to reconsider and if these bids are to be reopened, let's have some dignified and honorable ground rules whereby the position of your trustee will have some standing in this building.

An additional irregularity was the district judge's consideration of the ultimate use the bidders intended for the property. In the first place, this intention was requested of the bidders by the trustee at the judge's direction on December 11, long after the date the court ruled as the final date for bids. Thus the request was a complete afterthought. But more important, the property's ultimate use was not an appropriate matter for the court's consideration. Holleb's statement with regard to his plans to develop the property in no way bound him and of course could not be accomplished without approval of the city's building department and zoning board. If we take the judge's statements at face value, he permitted this extraneous and improper consideration to influence his decision.[2]

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[2] In the course of deciding to accept Holleb's bid the district judge commented:

> I considered the bids relatively the same. It was with this in mind, when after conferring with the Trustee, the Trustee's attorney, and the attorney in charge from the Securities & Exchange Commission, I asked to be supplied by each of the bidders with some additional information. This additional information was most important to me because I am not only working with the problem of an estate, the Weissberg estate, as that Weissberg estate extends across the whole of the country from Baltimore, Maryland to New Orleans, from the Lord Baltimore Hotel to the Fontainebleau, to Palm Beach, Florida and on up back to Chicago, but I am concerned with the fact that this Court is a part of the Northern District of Illinois which is also the fatherland, so to speak, or the motherland, of Chicago.
>
> I am concerned with what is going on and what is going to happen as a result of my rulings and my determinations in this case to a great city. You may make a ruling in one case that can affect the happiness of thousands of people in a certain area of the city, that will affect the tranquility

In sum, I believe that the procedure followed by the district judge in this bankruptcy sale was so haphazard and fraught with irregularities and aggravated unfairness

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[2] (Continued)

of the entire city, and rulings of courts in equity are not confined to just the facts before them.

They are to be expanded to include the over-all concepts of decency and wisdom and equity as they affect all of the people. This is why bankruptcy courts, courts in Chapter X's and Chapter XI's, have plenary jurisdiction.

It isn't always that a dollar more here will bring a better outcome for the estate, or a dollar less here will bring a better outcome for the city.

But in looking at the problem before me I wanted to be able to measure what will be the effect upon the whole of this estate, not just the very poor people and hardworkers who lost their jobs who worked out at the Edgewater Beach, but some of those hardworkers who have been laid off at the Emerson in Baltimore, Maryland; they are as interested in what happens at the Edgewater Beach as are the people who work for the Edgewater Beach, and the people who gave credit to the management in Palm Beach, Florida, they are just as interested in what happens to the Palm Beach as those who gave credit to the Palm Beach—I mean, to the Edgewater Beach Hotel.

So I asked Mr. Gesas to ask as quickly as possible each of the bidders to write me, send a copy of the letter to Mr. Windel and one to Mr. Gesas, and tell me "What is your ultimate use? What are your plans? How do you plan to go about using this? Over what period of time will it take to implement your program?" And then, "How can you demonstrate your financial capability," not only of paying us but carrying through on their program.

I got one letter. I am concerned because I have the greatest respect for Mr. Shlensky, and I did not know that his brother had died until just yesterday. I have known them for years and years. He did not have a chance. I believe he would have, had he had a chance, have answered that letter. He would have let me know.

I am satisfied with the program that has been suggested in the Holleb report, which I have had on my desk for

as to amount to a gross abuse of discretion. I would remand and order a new sale to be conducted.

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[2] (Continued)

several days, and opened just before I came in. This is not just to be another one of those slick, narrow, square, high-rise, flamboyant, sky-breaker batches of structural steel and cement and glass that desecrate the beauty of the landscape as you go north on Sheridan Road. What he has in mind will carry over many years of construction, in fact, they do not contemplate completion within three to four years.

It involves a magnificent housing development very much akin to what has been done with the Sandburg Village—I believe Sandburg Village was named—and South Commons, the Juneau Village, with shopping centers, off-street parking and lower level structures, some superstructures, high superstructures with a minimum of demolition as they progress so that there will be maximum availability for use by Loyola University of the center structure until it will be the last one to be replaced.

Well, this fits closer into the dream that I had for Chicago, Mr. Holleb, I will tell you the truth, this fits closer into the dream that I had for Chicago, knowing that the maximum use out there could not be another hotel than what I thought you had.

What I thought you had in mind was just another bunch of row houses, as I call them, row house 40-story apartment houses. If this is going to be something as you describe it, that will take its place in the place of the Edgewater Beach and lend to the beauty of the skyline what the Beach has given it over these many years, this I like. I have nothing else to go upon. Your bid gives out tomorrow.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

In the

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

IT IS ORDERED BY THE COURT, en banc that the petition for rehearing en banc in the above entitled causes be and the same are hereby denied.

(Note: Judge Swygert voted to grant the petition for rehearing en banc.)

In the

United States Court of Appeals

For the Seventh Circuit

May 20, 1969

ON PETITIONS FOR REHEARING[1]

Before SWYGERT, FAIRCHILD and CUMMINGS, *Circuit Judges.*

PER CURIAM. Appellants Rosenthal and Dunbar point out that we were in error in stating that "they do not assert that their free and clear bid, made November 22, was highest and best". They did so assert in their reply brief.

We conclude, however, in the absence of any concession, that their bid was not highest and best.

[1] An order has been entered by the full court denying suggestions for a rehearing in banc. *Circuit Judge* SWYGERT voted to grant rehearing in banc.

Their bid, as revised November 22, was $8,150,000 for the property, free and clear of encumbrances. Because of delay in payment (for four years, and without interest) of the portion which would represent the trustee's equity, evaluation required computation of the present worth of such portion. The Securities and Exchange Commission computed present worth at $877,329. With respect to price, this was lower than the Shlensky bids, either November 22 or December 6, lower than the Holleb bid of $800,000 for the equity plus $200,000 for the insurance claim, and lower than the Holleb alternative of $800,000 for the equity, with the trustee retaining the insurance claim, if one assigns to the insurance claim a liquidation figure of $78,000 or more.

With respect to the indemnity feature of the bids for the equity, the Rosenthal-Dunbar bid would be as good as the Holleb bid under either alternative, and as the Shlensky December 6 bid.

The Rosenthal-Dunbar bid presented contingencies which were not involved in the other bids. The commission pointed out to the district court: "Among these contingencies is the willingness of the mortgagees to give partial releases to their security, the maintenance of the estate in Chapter X for at least four more years, and the costs of administration during this time".

In addition, Rosenthal and Dunbar, shortly before the hearing on November 22, delivered to the trustee a "real estate contract" executed on behalf of the buyer. It is referred to in the letter which contains their revised bid of November 22 as a "suggested contract form". Although the status of this document, anent the bid, was somewhat equivocal, it did contain a provision for termination of the

contract at the election of the purchaser if the city failed to approve a planned development under certain provisions of the zoning ordinance.

Under the circumstances the Rosenthal-Dunbar bid was not the highest and best.

We find no merit in other propositions advanced by both appellants, and the petitions for rehearing are denied.

Circuit Judge SWYGERT adheres to his dissenting opinion filed herein and votes to grant the petitions for rehearing.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. 298

HERBERT M. ROSENTHAL AND DUNBAR BUILDERS CORPORATION,

Petitioners,

vs.

HARRY A. ASH, TRUSTEE, MARSHALL M. HOLLEB, NOMINEE, AND H. R. WEISSBERG CORPORATION, DEBTOR,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR MARSHALL M. HOLLEB, NOMINEE IN OPPOSITION.

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QUESTION PRESENTED.

The only question presented is factual: Did the court of appeals err in holding, under the particular facts and circumstances of this case, that the district court had not abused its discretion in confirming the bankruptcy sale of the Edgewater Beach Hotel to this respondent?

STATEMENT OF THE CASE.

Certain facts are omitted from petitioners' statement of the case.

The Edgewater Beach property was only one of a number of properties of the Debtor. The appraised value of this property was about five million dollars. Secured claims against the property aggregated seven million dollars. (App. 12.)[1] The appraised value of the equity was therefore negative.

The Debtor also held a claim for fire insurance damage. The value of this claim has not been determined. The Debtor has applied for judgment in the amount of $345,000. (Item 12.)[2] The insurance company made a settlement offer of $72,000. (Tr. December 17, 1968, p. 51.) Respondent purchased the insurance claim from the trustee for $200,000. (App. 27.)

There had been offers for the property prior to November 22, 1968. In September, 1968 respondent offered $100,000 for the equity if the trustee kept the insurance claim. $200,000 if the buyer received it. Respondent also agreed to indemnify the trustee against lienholders' claims for deficiency. (App. 32.) The trustee's counsel had indicated that the indemnity agreement had great value to the estate. (App. 33.) In October a widely advertised public sale took place. Respondent and one Harold Shlensky were the only bidders. Since Shlensky refused to indemnify, the bids were for the equity without indemnity. (Tr. Oct. 9, 1969, p. 66.) The highest bid was $410,000 for the equity with the buyer receiving the insurance claim. All bids were re-

1. "App. ....." refers to pages in the Appendix to the petition for certiorari.

2. The record designations used herein are those used in the petition.

jected and the trustee was authorized to sell at private sale. (App. 41.)

The sale of November 22, 1968 was accordingly limited to interested parties with whom the trustee had negotiated. The only bidders were respondent, petitioners, Shlensky and one D'Angelo, whose bid was subsequently withdrawn. Their bids were opened and read aloud; the bidders were authorized to reconsider their bids after a recess and to submit revised sealed bids later the same day. (App. 41.)

Since the terms of the sale had not been specified, the bids were widely divergent as to terms as well as to amounts, and were therefore not readily comparable. With respect to the bids of respondent, petitioner and Shlensky: (a) one bid included an indemnity, the others did not; (b) one bid was for the property free and clear of liens, the other two were for the equity; (c) two bids provided that the buyer should take the fire insurance claim, while one left it with the trustee with an option to sell it to the buyer at an agreed price; (d) each of the bidders deposited a different sum as earnest money.

The particular bids were as follows:

(1) *Holleb* offered to pay $800,000 in cash for the equity, exclusive of insurance proceeds which were to be left with the trustee, except that "at the option of the trustee" Holleb would also acquire the insurance proceeds and would pay an additional amount "equal to the value of such fire loss as agreed upon between the Trustee and the Buyer." Holleb also agreed to indemnify the estate against deficiencies. An earnest money deposit of $100,000 accompanied the offer. (App. 24-26.)

(2) *Shlensky* offered $960,000 for both the equity in the property and the fire insurance proceeds. His bid did not include an agreement to indemnify the estate against deficiencies, nor did he agree to give such indemnity

even after the bids were opened. (Tr. Nov. 22, p. 57.) Shlensky's earnest money deposit was $25,000. (App. 34.)

(3) *Petitioners* offered $8,150,000 for the property free and clear of all liens, $2,000,000 to be paid when clear title could be shown, $2,000,000 two years from said time and the remaining $4,150,000 four years from that time. They would retain the proceeds of the fire insurance. Petitioners would pay additionally an amount equal to the interest payable by the Debtor's estate on the outstanding liens and claims until they were discharged or until the entire purchase price was paid. A real estate contract for the purchase executed by the petitioners and referred to in the November 22 bid as a suggested contract form made the purchase conditional upon obtaining zoning amendments. (App. 50-51.) $200,000 was deposited as earnest money. (Tr. Nov. 22, p. 14.)

As contemplated in Holleb's bid, he and the trustee agreed upon the price at which the buyer would purchase the insurance claim. This was confirmed by respondent's letter to the trustee dated November 27, 1968:

> We have since had an opportunity to review the value of the insurance claim to which we referred in connection with our purchase price. Accordingly, we do herewith agree to purchase such fire loss from the Trustee for the price of $200,000. That amount is to be added to the $800,000 in cash above referred to, making a total purchase price of $1,000,000. (App. 27.)

On December 6, 1968, Shlensky substantially changed his previous bid (a) by offering to relinquish the insurance claim proceeds; (b) by agreeing to indemnify the estate against any claims which may be made against it by any of the holders of any liens and encumbrances, "subject to the right of the undersigned to defend such claims and liens at my expense in the event the Trustee fails to do so"; and (c) by adding $75,000 to his security deposit. (App. 14, 34.)

Pursuant to the district court's request, the trustee asked all bidders to submit information as to their financial responsibility and their intended use of the property. Holleb complied with this request. His letter of December 12, 1968 outlined a plan of development and contained, as an attachment, the commitment of Connecticut General Life Insurance Company to provide all funds required for performance. The other bidders did not respond. (App. 19.)

After hearing extended arguments concerning these divergent bids, the district court determined that the Holleb bid was the highest and best. (App. 16-18.)

Petitioners and Shlensky appealed to the court of appeals from the order confirming the sale to Holleb. The order was affirmed.

ARGUMENT.

1. There Is No Conflict Between Circuits.

There is no conflict between the Seventh Circuit and the Tenth Circuit.

Smith v. *Save-Rite Drug Stores*, 178 F. 2d 507 (10th Cir. 1949), cited by petitioners (pp. 8-10), involved different questions and entirely different facts. In *Smith* a petition for confirmation of a public sale of property to the highest bidder was still pending when an admittedly unsuccessful bidder was given an opportunity to make a second and higher bid. Confirmation of sale on this second bid was reversed—not because the original high bid had been rejected (it had not) but because it had been accepted.

The *Smith* case has been distinguished and confined to its facts by the later case of *J. J. Sugarman Co.* v. *Davis*, 203 F. 2d 931 (10th Cir. 1953). In *Sugarman*, where the original high bid had *not* been accepted, the sale of the

property to a new and higher bidder was affirmed. The court distinguished

> our case of *Smith* v. *Save-Rite Drug Stores, supra,* where the high bid at the sale was accepted and reported to the court with a recommendation that it be confirmed. We called attention that what the court did was to permit a subsequent higher bid while the matter was pending for confirmation on the original bid without first denying confirmation of the sale to the original bidder. (203 F. 2d at 233.)

It may be noted that the Tenth Circuit in *Sugarman* cited and followed the Seventh Circuit case of *Shipe* v. *Consumers Service Co.*, 29 F. 2d 321 (7th Cir. 1928).

The case at bar is closer on its facts to *Sugarman* than to *Smith*, although it differs markedly from both. As in *Sugarman*—and unlike *Smith*—the bids of the appellants in the case below (petitioners and Shlensky) had never been accepted, the property had never been sold to either of them and there was therefore no proceeding to confirm a sale to either.

Other differences between the *Smith* case and the case at bar may be noted. Unlike the *Smith* case where the party attacking the sale had been the high bidder, the petitioners in the case at bar had been the low bidders; their bid was found to be clearly inferior to that of either Holleb or Shlensky (App. 34, 49-51).

Again, unlike the *Smith* case, the party to whom the Edgewater Beach was sold was not an unsuccessful bidder. The statements in the petition (p. 8) that Holleb was "a low bidder" or "an apparent low bidder" on November 22 are completely unfounded, even assuming that the trustee would retain the fire insurance claim. On the contrary, Holleb's bid was found to be the highest and best (App. 18). It was better than the Shlensky bid of November 22 in that it included an indemnity and

permitted the trustee to retain the insurance claim. If the value to the trustee of the insurance claim (which was later sold for $200,000) and the value of the indemnity (which the trustee estimated as being worth more than $200,000 to $300,000: Tr. October 9, 1968, pp. 88-89) exceeded $160,000, then the Holleb price was higher than the Shlensky price (App. 35).

In *Smith* the second bid of the appellee was admittedly a new bid, entirely different from the first. This is not the case with Holleb's November 27 letter. His subsequent agreement to purchase the insurance claim was expressly contemplated in his original bid. As the court of appeals noted, the district court could properly conclude that

> the Holleb communication subsequent to November 22 could reasonably be deemed a clarification of the Holleb November 22 bid, so that the bid so supplemented could be considered consistent with the concept of finality. (App. 37.)

Indeed, if the insurance claim in the hands of the trustee was worth even 80% of what Holleb paid for it, then the letter of November 27 would leave the November 22 bid substantially unchanged.

The *Smith* case involved a public sale where the competing bids were for cash alone and were immediately comparable; there was no room for the exercise of judgment as to which bid was highest and best. The sale at bar, however, was a private sale where the bids were not comparable, the terms were widely divergent and the selection of the best bid required careful analysis and the exercise of judgment and discretion. Among the factors involved were the court's estimates of the value of the indemnity, the value of the insurance claim, the effect of the sale upon the reorganization as well as the buyer's ability to perform.

In *Smith* all the bids were lower than the appraised value. In the case at bar the district court elicited bids which resulted in a sale substantially in excess of the appraised value of the equity.

The controlling rule of law is the same in the Seventh Circuit as in the Tenth, namely, that a confirmed sale in bankruptcy will not be set aside except for an abuse of discretion. In each circuit the determination of whether or not there has been an abuse of discretion depends upon the facts in the particular case.

2. The Decision Below Does Not Sanction Such a Departure from the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision.

After considering all the issues, the court of appeals concluded:

> The results of the efforts from September 6 to November 22 were highly successful for the estate. Although only a few serious bidders came forward, there appears to have been full opportunity for interested persons to bid. We think the district court resolved the questions presented in a manner which can not be said to be an abuse of discretion (App. 40).

In the exercise of its discretion the district court noted the difference between the Holleb letter of November 27, which merely particularized the proposal to purchase the insurance claim contemplated in the November 22 bid, and the entirely new and different Shlensky bid of December 6, 1968. The form of the Holleb bid was not objected to by petitioner or any other party.[3] Moreover, as noted, the

3. The statement that petitioners had not learned until oral argument before the court of appeals that the discussion contemplated in Holleb's November 22 offer had actually taken place (petition p. 10) is patently incorrect. All parties were fully aware of these matters long before the sale was confirmed (e.g., Tr. December 17, 1968).

Holleb bid was reasonably found to be the highest and best bid on November 22 (App. 35).

Certainly petitioners' argument about the proper use of the word option in a bid (petition, p. 10) hardly justifies the drastic step of calling upon this court to discipline both the district court and the court of appeals.

3. There Is No Important Question of Federal Law.

No important question of federal law is raised on this record with respect to "subjective esthetic criteria" (petition, p. 11). As the court of appeals stated:

> We think favorable consideration of the type of development under consideration by the Holleb group was no more than a "make weight" here, and did not exceed proper bounds. (App. 39.)

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 298

In the

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HERBERT M. ROSENTHAL and
DUNBAR BUILDERS CORPORATION,

Petitioners,

vs.

HARRY A. ASH, Trustee, MARSHALL M. HOLLEB, Nominee, and H. R. WEISSBERG CORPORATION, Debtor,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondents, Harry A. Ash, Trustee in Bankruptcy, and H. R. Weissberg Corporation, debtor, pray that this Court decline to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this cause on April 4 and 25, 1969.

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals are not yet reported. They appear in the petitioners' appendix, pp. 32-48. A petition re rehearing *en banc* was filed and denied on May 20, 1969. Also on May 20, 1969, Judges Fairchild and Cummings issued an additional *per curiam* opinion with Judge Swygert again dissenting. The supplemental opinion and dissent is unreported to date and appears in the petitioners' appendix pp. 49-51.

The trial court announced its decision on December 17, 1968, and followed that decision by a written order and memorandum confirming the sale on January 15, 1969. The decision and the written order appears in the petitioners' appendix at pp. 1-6 and pp. 7-31.

QUESTION PRESENTED

May a district court allow a successful bidder to clarify its bid after a judicial sale and prior to confirmation?

STATEMENT OF THE CASE

The petitioners state that "no questions of fact are involved" (petitioners' Brief in Support of Petition for a Writ of Certiorari, p. 7). Petitioners' statement is not true.

The only issues in this case were questions of fact which have already been resolved against the petitioners by both the District Court and the Court of Appeals. The factual background is well stated in the majority opinion of the United States Court of Appeals for the Seventh Circuit of April 25, 1969 (petitioners' appendix p. 32). In the interest of brevity we shall include only a summary of those facts.

This matter involves a judicial sale during a Chapter X reorganization proceeding. The debtor, H. R. Weissberg Corporation, owned several hotels, including the Edgewater Beach Hotel in Chicago, Illinois (hereinafter referred to as "Edgewater property"). There were secured claims against the Edgewater property as follows:

First mortgage	$1,834,488.
Second mortgage	3,995.062.
Pension fund	364,585.
Furniture security agreement	135,000.
Mechanics liens	116,951.
Taxes established as of 8/1/68	250,000.
Total	$6,696,086.

Including accrued interest, such claims totaled approximately $7,000,000. (petitioners' appendix p. 12). Further, the property had been damaged by fire and the trustee had brought action against the insurer in which the trustee claimed in excess of $350,000. (petitioners' appendix p. 11). The insurer offered approximately $72,000. in settlement. In September, 1968 the trustee received an offer of $100,000 for his equity if the trustee kept the insurance claim and $200,000. if buyer acquired it. The buyer would also indemnify the trustee from certain substantial lienholders' claims for deficiencies. The trustee concluded and the District Court decided that a sale of the Edgewater property, other than pursuant to a plan or reorganization was proper. No one has challenged this conclusion nor the underlying evaluation of circumstances. The District Court ordered a sale on October 9, 1968. The sale was widely advertised and bidding took place in open court. There was no bid for the property free and clear of encumbrances. The highest bid received was $410,000. for the equity, with the buyer

receiving the insurance claim, but without the buyer's agreement to indemnify. The District Court rejected all bids and authorized the trustee to sell at public or private sale, subject to court approval.

The trustee elected to invite sealed bids, to be opened at a hearing before the Court November 22, 1968. Counsel for the trustee announced that after he opened and read the bids there would be a recess, after which a further and final bid could be made, followed by evaluation of the bids.

During the course of the transactions referred to, from September 6 to November 22, 1968, the bids were for the trustee's equity in the property, except for one bid (Rosenthal and Dunbar) for the property free and clear of encumbrances. Though the trustee had requested prospective purchasers to make their bids on a uniform basis, some of the bids for the equity contemplated that the purchaser would receive the fire insurance claim, but some did not. Some of the bids for the equity included an agreement by the bidder to indemnify the estate from claims for deficiency on behalf of holders of encumbrances. Trustee's counsel had indicated that the indemnity agreement had significant value to the estate.

Four bidders submitted bids on November 22, 1968: Marshall Holleb, Harold Shlensky, Rosenthal-Dunbar, and Dino D'Angelo. D'Angelo withdrew his bid at the hearings on confirmation. The Rosenthal-Dunbar and D'Angelo bids were inferior to the other two bids received. Holleb's November 22, 1968 bid was better than Shlensky's.

The District Court approved and ordered the trustee to accept the Holleb bid. As presented after the recess on November 22, 1968, it was an offer of $800,000. for the trustee's equity, and included an agreement to indem-

nify. With respect to the insurance claim, it was in the alternative: the trustee could keep the insurance claim, or could transfer it to Holleb at a price to be mutually agreed upon. On November 22, 1968 no one objected to the form of the Holleb offer.

On November 27, 1968, Holleb agreed to a $200,000 figure for the insurance claim. This however was merely a filling in of his November 22, 1968 alternative offer.

On December 6, 1968, Shlensky attempted to change his November 22, 1968 offer by permitting the trustee to keep the insurance claim, giving an agreement to indemnify, and increasing his deposit.

On December 11, 1968, the trustee's attorney, at the request of the Court, asked each bidder to state the use it intended to make of the property and to give evidence of the bidder's ability to perform on approval of the bid. Holleb was the only bidder who replied. His letter named the architects who had been engaged, the intended usage of the property and his ability to perform.

After the hearing, at which the District Court announced its decision to approve the Holleb bid, detailed findings, conclusions and an order were filed (petitioners' appendix pp. 7-23). An appeal was taken by Harold Shlensky and H. M. Rosenthal and Dunbar Builders Corporation to the Court of Appeals for the Seventh Circuit. On appeal, the Court of Appeals for the Seventh Circuit affirmed, Judge Swygert dissenting (petitioners' appendix pp. 32-48). Rehearing *en banc* was denied on May 20, 1969, Judge Swygert dissenting (petitioners' appendix pp. 49-51).

ARGUMENT

The petitioners have sought to distort the facts of this case in order to create an imagined conflict between the Seventh and the Tenth Circuit on the subject of the finality of judicial sales. Put bluntly, there is no conflict between the decision in the instant case rendered by the Court of Appeals for the Seventh Circuit and the decision relied upon by the petitioners rendered by the Tenth Circuit in *Smith* v. *Save-Rite Drug Stores,* 178 F.2d 507 (10th Cir., 1949).

The Court of Appeals in *Smith* v. *Save-Rite Drug Stores,* supra, was confronted with a situation where a district court had permitted ". . . an unsuccessful bidder at [a] trustee's sale to submit a higher bid while the matter was pending for confirmation without first denying the petition for confirmation of the sale [to a higher bidder]." (*Smith* v. *Save-Rite Drug Stores,* supra, at p. 509). The Tenth Circuit ruled that "A practice of permitting an *unsuccessful* bidder at a public auction, through sealed bids, after the amount of the highest and best bid at the auction has been disclosed, to submit a second bid when the matter comes on for confirmation of the sale, would tend to destroy the efficacy of auctions through sealed bids" (*Smith* v. *Save-Rite Drug Stores;* supra, at p. 510). [Emphasis added.]

The Court of Appeals for the Seventh Circuit expressly adopted the Tenth Circuit rule and concept of finality in this case (petitioners' appendix pp. 37-38). The Court of Appeals for the Seventh Circuit pointed out that the communications of the successful bidder, Holleb, subsequent to November 22, 1968, could reasonably be deemed to be

really a clarification of Holleb's November 22, 1968 bid so that Holleb's bid as supplemented could be considered consistent with the concept of finality. Mr. Shlensky's December bid was considered by both the Court of Appeals and the District Court to be a new bid and so the District Court could not consider Mr. Shlensky's December bid without undermining the concept of finality (petitioners' appendix p. 37). The Court of Appeals noted that "the policy of giving great weight to observing the finality of the bidding day has long been recognized" and discussed at some length the propriety and necessity for the rule which has been ". . . adopted by the great majority of American courts" (petitioners' appendix p. 38). Thus the decisions of the United States District Court of the Northern District of Illinois and the United States Court of Appeals for the Seventh Circuit in this case show, upon their face, that they are not only consistent with the Tenth Circuit's enunciation of the principle involved but indeed are identical to the Tenth Circuit position. There is no conflict whatsoever between the Tenth Circuit and the Seventh Circuit.

The petitioners, unsuccessful bidders, seek to disturb the finality of the sale so as to enable them to submit a second bid. Thus the result desired by the petitioners is in direct conflict with the holdings of both the Seventh and the Tenth Circuit. In order to twist the factual situation so as to make it appear that the United States District Court for the Northern District of Illinois and the United States Court of Appeals of the Seventh Circuit had permitted and sanctioned a bidder to change its bid after sale had become final, the petitioners refer throughout its statement of facts and its argument to Holleb as a "low bidder" or simply as a "bidder". The important fact, as found by both the District Court and the Court

of Appeals, is that Holleb was the successful bidder as of the final bidding date, November 22, 1968. The trustee announced on November 22, 1968, that "This is the final bidding hour as far as the trustee is concerned, unless the court will direct otherwise" (tr. Nov. 22, 1968, p. 50). The District Court recognized this and said, "I think the position I understand the trustee to have taken is that as far as the trustee is concerned he is finished with asking for bids" (tr. Nov. 22, 1968, p. 67). The District Court expressly found that "The designation by the Trustee in this regard of the 5:00 P.M. hearing on November 22, 1968, as being the final time and date of submission of bids should and does control herein. The SHLENSKY bid as made at 5:00 P.M. on November 22, 1968 is less than the HOLLEB bid of that date considering the evaluation of the insurance claim of $200,000., as reserved by HOLLEB in his bid on that date" (petitioners' appendix p. 16).

The District Court then stated that "The undertaking of December 2, 1968, of HOLLEB, in which he agrees to pay the insurance adjuster, is merely a clarification of the insurance claim net evaluation, and the undertaking with respect to the claims secured by hotel furnishings merely reiterates the HOLLEB agreement stated in open court on October 9, 1968, the first hearing on return of bids" (petitioners' appendix p. 17).

This case involves nothing more and nothing less than an unsuccessful bidder's attempt to reopen bidding after a sale had become final. There was no fraud, mistake, inadequacy or other such infirmity that would justify setting aside or otherwise disturbing the confirmation of the sale. As stated in *In re Webcor*, 392 F.2d 893, 899 (7th Cir. 1968), cert. den., 393 U.S. 837, "If parties are

to be encouraged to bid at judicial sales, there must be stability in such sales and a time come when a fair bid is accepted and the proceedings are ended. . . . Once the sale of the assets . . . [are confirmed] the existence of fraud, mistake or a like infirmity would be necessary to set that confirmed sale aside."

The fact that the District Court in rendering its decision to confirm the sale noted that only the successful bidder had answered the court's request that the court be informed of the intended usage of the Edgewater property and evidence ability to perform forthwith upon approval of a bid, is not evidence of fraud, mistake, inadequacy or other such infirmity as would support setting aside or otherwise disturbing the confirmation of the sale.

The Court's statement that the successful bidder's use of the purchased property was laudable, was obviously a mere afterthought and is, as the Court of Appeals for the Seventh Circuit stated, "a make weight" and "did not exceed proper bounds" (petitioners' appendix p. 39).

Petitioners have failed to show that there is a genuine conflict between the circuits on any question of bankruptcy law and no other substantial basis has been shown by the petitioners in their request that this Court issue a writ of certiorari to the United States Court of Appeals of the Seventh Circuit.

CONCLUSION

The petitioners were unsuccessful bidders at an open, public, judicial sale. The mere fact that the District Court allowed the successful bidder to clarify his bid before confirmation does not amount to an abuse of discretion on the part of the District Court, nor is there present any question of fraud, mistake or a like infirmity.

The District Court's statements to the effect that the successful bidder's intended use of the purchased property was, in the Court's opinion, laudable, was a mere afterthought and as the Court of Appeals of the Seventh Circuit observed, a "make weight" which did not exceed proper bounds (petitioners' appendix p. 39). The District Court, in this case, successfully insured that the highest bid from a financially responsible bidder was received consistent with the doctrine of finality.

The Court of Appeals affirmed the judgment of the District Court and in doing so expressly adopted the doctrine of finality of bidding of the Tenth Circuit. There is no conflict between the Seventh and the Tenth Circuits on the subject matter before this Court and there is no need or reason for this Court to issue a writ of certiorari in this case.

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